SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1943

No. 22

CITY OF OAKLAND, acting by and through its Board of Port Commissioners,

Appellant,

vs.

THE UNITED STATES OF AMERICA AND UNITED STATES MARITIME COMMISSION,

Appellees.

Appeal from the District Court of the United States for the Northern District of California

OPENING BRIEF OF APPELLANT CITY OF OAKLAND.

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Counsel for Appellant.

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I.

REFERENCE TO OPINION OF COURT BELOW IN THE ORIGINAL REPORT.

The opinion of the Court below in this cause is reported under the title of *State of California, et al. v. United States, et al.; City of Oakland v. Same*, 46 F. Supp. 474.

II.

STATEMENT OF GROUNDS ON WHICH JURISDICTION ON THIS APPEAL IS INVOKED

The jurisdiction of this Court to entertain this appeal is provided expressly by statute. The cause being a proceeding to review an order of the United States Maritime Commission, the jurisdiction is that set up in connection with decisions of the Interstate Commerce Commission. The following statutes are pertinent.

Section 210 of the Judicial Code as amended (U. S. Code Title 28, Sec. 47a) provides in its pertinent part, as follows:

> "A final judgment or decree of the District Court in the cases specified in Section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the notice required shall be served upon the defendants in the case and upon the attorney general of the state. The District Court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse or modify as the case may require the final judgment or decree of the District Court in the cases specified in Section 44 of this title * * * " (March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; October 22, 1913, c. 32, 38 Stat. 220).

The appeal likewise is authorized by Title 28, Section 47, U. S. Code, reading in part as follows:

> "* * * An appeal may be taken directly to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if an appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said Commission, the same requirement as to judges and the same procedure as to expedition and appeal shall apply." (October 22, 1913, c. 32, 38 Stat. 220.)

The Shipping Act, 1916 (U. S. Code, Title 46, Sec. 830; 39 Stat. 738) and particularly Section 31 thereof, and the Merchant Marine Act, 1936 (49 Stat. 1985) make the foregoing provisions applicable to decisions of the Maritime Commission. Said Section 31 provides as follows:

> "The venue and procedure in the courts of the United States in suits brought to enforce, suspend or set aside in whole or in part, any order of the board, except as otherwise provided for, shall be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district courts having jurisdiction over the parties."

III.

STATEMENT OF THE CASE.

The underlying issue presented on this appeal is the authority of the United States Maritime Commission to regulate the rates and practices of a municipal corporation engaged in the operation of public docks.

More specifically, the question involves the validity of an order of the Commission (1) requiring certain leases made by the City of Oakland to be submitted to the Commission for its approval or denunciation; (2) shortening free time allowances; (3) changing wharf storage rates from the existing daily basis by requiring the assessment of a preliminary penalty charge and a subsequent exaction of a handling charge with the storage charge placed on a period basis.

Free time is the period allowed for the assembling of cargo on the wharf preliminary to loading aboard the vessel, or for the delivery of cargo after discharge by the vessel (Report of the Comm., R. p. 23). Wharf storage (or wharf demurrage) is the charge accruing on cargo remaining on the wharf after the expiration of free time (*Ibid.*, R. p. 26).

A handling charge, as defined by the Commission, "compensates the terminal operator for a portion of the fixed costs which attach to cargo that is placed on time storage. Such fixed costs include handling, delivery to consignee at the end of storage, high piling where required, billing and certain overhead expenses incidental

to the receiving and delivery of cargo on storage." (*Ibid.*, R. p. 36.) Appellant accepts this definition for introductory purposes only, reserving the right later to question the cogency of any one of the factors assigned should it become material.

Strictly speaking, wharf demurrage and wharf storage are based on opposite concepts, though both fall within the definition above given. Wharf demurrage is a penalty rate, on a level sufficiently high to force the cargo off the dock during the free time period (*Ibid.*, R. p. 27). Wharf storage, on the other hand, is designed to produce some additional revenue by encouraging, through a lower rate, the cargo to remain on the dock beyond the free time period (Witness McCarl, R. p. 341).

Generally, the operator of a narrow transit shed (the covered space on the wharf or pier) favors a penalty rate because stored cargo is apt to interfere with the movement of other goods; whereas, when the shed is broad, permitting much freer movement, the tendency is to assess the charge on the additional revenue basis. At San Francisco, for example, with its finger-pier construction, the penalty charge is assessed. (Report of the Comm., R. p. 27), save as to certain facilities, while at Oakland, with wider, more modern sheds (Witness McCarl, R. p. 340-1), the lower wharf storage rates are prescribed.

This cause is the outgrowth of an order of the Maritime Commission of November 7, 1939, initiating, on its own motion, an investigation into the rates and practices

of wharfingers on San Francisco Bay, being docketed as No. 555 on the records of the Commission (R. p. 125 *et seq.*) This appellant was named as a respondent. By supplemental orders, the appellants in the companion appeal (Docket 20) were made parties. (R., pp. 127-29.)

Hearings were had February 13-21, 1940 and, after continuances, October 7-9, 1940. (R. pp. 53, 71.) At the outset, and again at the termination of the hearing, this Appellant moved to dismiss the proceeding as to it on the ground that the Maritime Commission had no jurisdiction over a municipal corporation or a state agency, and that Congress had no constitutional power to regulate the governmental activities of such local body (R., p. 71). The motions were denied (R. pp. 53, 71).

Thereafter, Appellant filed with the Commission its opening and closing briefs urging on it not only all the points included within the motions to dismiss, but also all other points presented to the Court below (R., pp. 53, 71); and the matter was orally argued before the Commission on July 9, 1941 at Washington, D. C., at which time appellant reiterated all of such points (R., pp. 54, 71).

That thereafter and on the 11th day of September, 1941 said Commission made and filed its Order in said proceeding wherein and whereby it found, among other things:

1. That Congress had constitutional power to regulate the operations of Appellant in the matter now carried on.

2. That Appellant was within the definition of "other persons" as defined in Section 1 of the Shipping Act of 1916.

3. That Appellant is required by Section 15 of the Shipping Act, 1916 to file with and have approved by the Commission a certain lease with Howard Terminal, one of the other respondents named in said proceeding, dated November 5, 1914, by which said Howard Terminal leased certain waterfront facilities from the City of Oakland.

4. That Appellant is required by Section 15 of the Shipping Act, 1916 to file with and have approved by the Commission a certain agreement between the City of Oakland and McCormick Steamship Company, a common carrier by water, dated March 1, 1932, whereby said McCormick Steamship Company occupies certain waterfront facilities.

5. That Appellant has failed in certain instances to give reasonable notice of tariff changes and prescribing a thirty (30) day prior notice in the future.

6. That the free time periods allowed by Appellant for the removal of cargo from the facilities under its jurisdiction are unduly prejudicial and preferential in violation of Section 16, and unreasonable in violation of Section 17 of the Shipping Act, 1916, as amended, and that any such allowance greater than the period set forth in Table I attached to said Order, which in general reduces such free time allowance from the existing ten

(10) day period allowed by Appellant to five (5) and seven (7) days, will in the future be unduly prejudicial and preferential and unreasonable.

7. That Appellant's rates, rules, regulations and practices relating to wharf demurrage and wharf storage are non-compensatory resulting in unequal treatment of non-users of such services. That said rates, rules, regulations and practices are unduly prejudicial and preferential in violation of Section 16 and unreasonable in violation of Section 17 of the Shipping Act, 1916 as amended and that in the future the assessing and collecting of any charge for such wharf demurrage and wharf storage lower than the schedule of charges prescribed in said order would be unduly prejudicial and preferential and unreasonable. That the rates prescribed for such wharf storage by said Order are set forth in Exhibit 1 made a part hereof and attached hereto (R., pp. 13-45).

That Appellant filed with the Commission its petition for reconsideration on October 15, 1941 (R. pp. 59, 72) which was denied by order of October 24, 1941 (R., p. 73).

The present proceeding to review the order of September 11, 1941 was filed in the District Court on October 21, 1941. At the trial the matter was presented on the record adduced before the Commission, which consisted of the various notices, orders and moving papers of the Commission, eleven volumes, consisting of 1904 pages, of the testimony before the Commission, and

the 172 exhibits which had been before the Commission (Minute Entry of Trial, R. pp. 79-80).

After an adverse decision in the Court below, this appeal followed.

IV.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED BY THIS APPELLANT.

Appellant City of Oakland intends to urge in this brief and on oral argument all of the specifications of errors heretofore assigned, that is to say:

(1) The Court erred in making and entering its final decree denying the permanent injunction prayed for, and in dismissing the petition and bill;

(2) The Court erred in refusing to make and enter its decree annulling, setting aside and permanently enjoining the order of the United States Maritime Commission designated in said petition and bill;

(3.) The Court erred in finding and concluding that this Appellant is subject to the power of Congress to regulate interstate and foreign commerce in respect to the activities affected by said order of said Commission;

(4) The Court erred in finding and concluding that this Appellant is an "other person" as defined in the Shipping Act, 1916, as amended;

(5) The Court erred in finding that Appellant's rules, regulations and practices with respect to free-time were or are unduly preferential and 'prejudicial' within the meaning of Section 16 of the Shipping Act, 1916, or unreasonable regulations and practices within the meaning of Section 17 of said act;

(6) The Court erred in finding that the evidence before the Commission and the Court is sufficient to establish that Appellant's rates for wharf storage are unduly preferential or prejudicial within the meaning of Section 16 of the Shipping Act, 1916, as amended, or that they constitute an unreasonable regulation or practice within the meaning of Section 17 of said act in that the evidence establishes that such rates are greater than Appellant's out-of-pocket costs incurred in connection with such service;

(7) The Court erred in finding that there was evidence to support the finding of the Commission that the minimum rates for wharf demurrage and wharf storage prescribed by the Commission are not in excess of the cost of the service to this Appellant, if by cost is meant out-of-pocket cost of such service;

(8) The Court erred in finding that the services performed by Appellant in connection with wharf storage and wharf demurrage are carried on in connection with a common carrier by water;

(9) The Court erred in finding that leases between this Appellant and its lessees are agreements subject to the provisions of Section 15 of the Shipping Act, 1916, as amended.

V.

SUMMARY OF ARGUMENT.

Appellant proposes to urge on this Court the following propositions:

A. That the power of Congress does not extend to the regulation of state agencies engaged in the operation of wharves; that the authorities indicate that the powers of Congress and the states in this connection are concurrent at the most and, at the least, the question being a local one, regulation of this activity belongs primarily to the states.

B. That Congress did not intend to empower the Maritime Commission to regulate state agencies in the operation of wharves; that ordinarily, the word "person" does not include a public body, by construction of which word is the only means of including a municipal corporation within the provisions of the Shipping Act, 1916; that neither Congress nor the predecessors of the Commission understood a public agency to be subject to the Act, and that this was the understanding of those engaged in such operations.

C. That the Maritime Commission has no power over the rates of any wharfinger; that the Shipping Act, 1916, makes this plain; that the attempt of the Commission to seize jurisdiction in this proceeding is based on a pretended power to remove discrimination; that the record shows that no discrimination in fact exists; that Appellant more than meets its out-of-pocket expenses in

connection with the particular rates assailed, which is an answer to the charge of discrimination, since it casts no burden on the users of other services.

D. That the order of the Commission with respect to free time allowance is without support in the record, and the Commission marshals no facts to support its conclusion.

E. That the Commission has no jurisdiction over wharf storage in any event, because the Shipping Act, 1916, excludes it, the service not being rendered in connection with a common carrier by water; that the service is one arranged for directly between the wharfinger and the shipper or consignee, the water carrier having no interest in it; and, finally

F. That the Commission has no authority over municipal leases and agreements.

VI.

ARGUMENT.

Before the Commission, and again before the Court below, in pleadings and briefs (see, for example, Petition and Bill for Injunction, paragraph VI, R., p. 55), this appellant urged that it was deprived of a fair hearing because the Commission acted as accuser, prosecutor, witness and judge. Neither the order of the Commission nor the opinion of the Court passed on it. The point as such is not pressed on this appeal. Therefore the question of due process of law is not now involved.

Nonetheless an allusion to the circumstances is proper in aiding this Court to determine the degree of finality that should be accorded the Commission's order.

We shall see that the statute under which the Commission purports to act does not, by its terms, give the authority invoked, and that jurisdiction, in the words of the Commission, is "assumed" (R., p. 18); that the power to regulate rates of wharfingers is engrafted on the power to remove discrimination; that this power was thought not to exist until about the time of the institution of the present proceeding, either by the administrators of the Shipping Act, 1916, for the first twenty-four years of its being, by Congress, by the Federal Coordinator of Transportation, or by those engaged in the operation of wharves.

Thus the question of jurisdiction is at least doubtful, and its solution depends upon an administrative finding

of discrimination. If that finding is given color of finality, we have the spectacle of a commission lifting itself by its bootstraps.

The Commission was the accuser. It instituted the proceeding on its own motion, making the preliminary finding (R., p. 126):

> "That all or some of said terminals . . . make rates . . . and engage in acts and practices which are unfair, unjust or unduly prejudicial or preferential, or otherwise in violation of the law, in that all or some of said terminals: . . .
>
> "3. Fail to establish, observe and enforce just and reasonable regulations and practices relating to or connected with the receiving, storing or delivery of property, as required by section 17 of the Shipping Act, 1916, as amended . . ."

The Commission was the prosecutor. Note the appearances for the Commission (Mr. Scoll, Mr. Slade, Mr. Differding and Mr. Arnold) in the Report of the Commission (R., p. 14). These gentlemen had the active management and direction of the hearing. The most casual perusal of the transcript of the testimony before the Commission substantiates this. (See, for example, R., p. 237 *et seq.*)

The Commission was the judge, which goes without saying.

But the Commission was also the witness, the witness upon whose testimony the order was based. Mr. Differ-

ding, who also appeared, as noted above, of counsel for the Commission, was engaged as a special expert by the Commission for the proceeding (R., p. 238). He was its principal witness and gave opinion testimony on which the Commission relied in making its order (R., p. 18, 29, 36). Most of his testimony was omitted from the printed record, but that which remains consumes 67 pages (R., pp. 237-74; 709-39). In addition, he cross-examined appellant's witnesses. (See R., p. 304-21; 344-53.)

We do not charge any of these gentlemen with unfairness. We do say the procedure, however, is peculiarly adapted to unfairness if the decision that grows out of it is not to be subjected to the searching light of judicial scrutiny. We do not contend that we are entitled to a trial *de novo*, but we do affirm that under circumstances such as those here presented, judicial review must be real, the facts purporting to support the Commission's order must be clearly to appear, if the procedure is to stand the test of constitutionality. And under the familiar rule of avoiding constitutional questions if an alternative can be found, we ask for that kind of review by this Court.

To give any degree of finality to the finding of discrimination in this proceeding is to place this appellant, and all who may follow it in like proceedings hereafter, in a position of utter helplessness.

In the language of Chief Justice Taft, in *Tumey* v. *Ohio*, 273 U. S. 510, 532 (47 S. Ct. 437; 71 L. Ed. 749):

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law."

See also, Mr. Justice Field, dissenting, in *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347, 364 (4 S. Ct. 48; 28 L. Ed. 173), and *Abrams* v. *Jones*, 35 Ida. 532; 207 Pac. 724, 727.

If one were possessed of a prejudgment, and wished to fasten the corollaries of that conclusion on another, he could devise no scheme better adapted to his purpose than the one here employed by the Commission. For could he not make an accusation, prosecute it, employ as a witness one who believed as he did, and then, having gone through the form of notice and hearing, disregard all conflicting testimony, and having some evidence in the record to support it, assert that his judgment is now unassailable?

Before proceeding with the substance of the argument, a further fact should be emphasized. This appeal does not affect the wartime activities of the Maritime Commission. The investigation was initiated, as we have seen, in November, 1939. There is no suggestion, on

or off the record, that national interests in any way are prejudiced by the maintenance of the existing rates, nor any intimation that the present tariff impedes the flow of interstate or foreign commerce or discriminates against either in favor of local trade. Therefore, no consideration of exigencies of war have any place in this deliberation.

Point A. Congress Cannot Constitutionally Empower the Regulation of State Agencies in the Operation of Wharves.

The Court below decided this point against Appellant largely on the authority of *United States* v. *California*, 297 U. S. 175; 56 S. Ct. 421; 80 L. Ed. 567. Possibly, because it diverges from counsel's conception of the proper interrelation of our state and federal governments, he questions its soundness, at least to the extent that it be not extended. At any rate, this Court must pass on the question before it finally can be settled, and there would seem to be some very cogent reasons why Congress might have power to regulate a state operated railroad and yet deny that power with respect to wharves.

The facilities operated by this Appellant are under the control of the Board of Port Commissioners, a department of the City, and its legislative body insofar as harbor matters are concerned. (*City of Oakland* v. *Hogan*, 41 Cal. A. 2nd 333; 106 Pac. 2nd 987). It exercises the power granted it by amendments to the City Charter (Statutes of California, 1911, p. 1551), adopted in 1927, with subsequent amendments (Statutes of California, 1927, p. 1978; *ibid.*, 1931, p. 2677; *ibid.*, 1937, p. 2631).

This Court was very careful to limit its holding in the California case to the precise set of facts before it, namely, the operation of a railroad by the State of California, acting through its public agency, the Board of State Harbor Commissioners for San Francisco Harbor. In effect it goes no further than did the Court in *South*

Carolina v. *United States*, 199 U. S. 437; 26 S. Ct. 110; 50 L. Ed. 261, and in *Ohio* v. *Helvering*, 292 U. S. 360; 54 S. Ct. 725; 78 L. Ed. 1307, where it refused to recognize the tax immunity of a state engaged in the liquor business, or in *Helvering* v. *Powers*, 293 U. S. 214, 55 S. Ct. 171, 79 L. Ed. 291, where a similar pretended immunity was found lacking in the operation of a street railroad business. In the California case, the Court was considering the amenability of the State to the sanctions of the Federal Safety Appliance Act insofar as was concerned the operation of a belt line railroad. The Court said, at page 185:

> "California by engaging in interstate commerce *by rail*, has subjected itself to the commerce power and is liable for a violation of the Safety Appliance Act, as are other carriers . . . . The Federal Safety Appliance Act is remedial, to protect employees and the public from injury because of defective railway appliances . . . and to safeguard interstate commerce itself from destruction or injury due to defective appliances upon locomotives and cars used on the highways of interstate commerce, even though their individual use is wholly intrastate . . . The danger to be apprehended is as great and commerce may be equally impeded whether the defective appliance is used on a railroad which is state-owned or privately-owned. No convincing reason is advanced why interstate commerce and persons or property concerned in it should not receive the protection of the act whenever a state as well as a privately-owned carrier, brings itself within the sweep of

the statute, or why *its all embracing language* should not be deemed to afford that protection." (Italics supplied.)

Previously, at page 183, the Court had recognized that the State "in operating its railroads . . . is acting within a power reserved to the states".

Counsel must concede that this decision would have a persuasive effect on the present issue, especially in view of the Court's further statement on page 183 that the distinction whether the State was acting in a proprietary or governmental capacity was immaterial, were it not for differences we have mentioned and shall now point out.

We should remember that this Court has never held that Congress has the power to regulate a state which engaged in the operation of wharves.

The federal commerce power is incapable of precise definition. Any investigation of the subject, whether it be cursory or painstaking, demonstrates that each particular case must be decided upon its own facts. While it may be true that a state in operating a railroad is subject to the regulations of commerce it can quite consistently be held that in operating the wharves it does so with an untrammelled hand. Thus, not every activity of the state which affects interstate commerce is subject to the scrutiny of Congress.

Take, for example, the matter of streets and high-

ways. It cannot be doubted that they constitute important facilities of interstate commerce. The same is true of bridges, whether they be toll bridges or free bridges, connecting such highways. While under the commerce as well as the postal power, the federal government has contributed moneys for the construction of such projects, and in such cases has exercised a supervising or consulting right, yet it cannot be doubted that the construction, operation and maintenance of, and even the matter of tolls on, such bridges or highways, if the state seeks to impose them, are matters strictly within the power of the state. No court decision yet has advanced so far the idea of central authority as to suggest that Congress might regulate any of these matters contrary to the wishes of the state involved. This, of course, is true notwithstanding such facilities are important arteries of such commerce.

In its nature a wharf partakes of the character of a public street. See, for example, *Clark* v. *McCarthy*, 1 Cal. 453, 454, where a wharf is spoken of as a continuation of a public street. Compare Subdivision 11, Section 212 of the Oakland City Charter (Statutes of California, 1927, p. 1978) where the Board of Port Commissioners is given the power "to use, for the loading and unloading of cargo with the right to collect tolls, dockage and other terminal charges thereon, such portions of the streets of the City of Oakland ending or fronting upon the water areas of the harbor of said city as may be used for said purposes".

Highways, wharves and ferries are treated by the authorities as belonging to the same class. See, for example, *Talcott* v. *Pine Grove*, Fed. Cas. No. 13735, 23 Fed. Cas. 652; 660-661, where it is said, in part:

> "3 Kent Comm. 458 says that there are certain franchises which are understood to be royal privileges in the hands of the subjects. The right to set up a ferry or a road and the taking of tolls is one of them, and in this the public has an interest. In 2 Bl. Comm. 37 it is said that 'A franchise is a branch of the royal prerogative in the hands of the subjects', such as the right of taking tolls for a bridge, way or wharf. (See 3. Bl. Comm. 219.) . . . "

Again in *Peo.* v. *San Francisco & Ala. R. R. Co.*, 35 Cal. 606, 619, the Court says:

> "A ferry is but a substitute for a bridge where a bridge is impracticable and its end and use is the same. Like a toll-bridge it is a franchise created for the use and convenience of the traveling public as a link in the highway system of the country . . . "

Therefore, if it be conceded that Congress has no right to prescribe the tolls a state may charge for one of its bridges or highways, does not the same conclusion follow with regard to wharves operated by the state?

The view that regulation of matters of this class did not reside in Congress but was reserved to the state was laid down by Chief Justice Marshall in *Gibbons* v.

Ogden, 9 Wheat. 1 (6 L. Ed. 23), at page 203, where he said:

> "But the inspection laws are said to be regulations of commerce . . . That inspection laws may have a remote and considerable influence on commerce will not be denied; but that power to regulate commerce as the source from which the right to pass them is derived cannot be admitted . . . These form a portion of that immense mass of legislation, which embraces everything within the territory of a state, not surrendered to the general government; all of which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws regulating the internal commerce of the state *and those which respect turnpike roads, ferries, etc.* are component parts of this mass.
>
> "No direct general power over these objects is granted to congress; and consequently they remain subject to state regulations . . . " (Italics supplied.)

Not unduly to lengthen this discussion, your attention is called to *Port Richmond Ferry Co. v. Board of Chosen Freeholders*, 234 U. S. 317, 34 S. Ct. 821, 58 L. Ed. 1330, where the state's right to regulate the rates of an interstate ferry departing from its shores is upheld.

It has been laid down in many cases that there are three fields of action involving interstate commerce; the first of which is the one in which Congress may act

exclusively and the third of which is that which is reserved absolutely to the state. The middle ground is a twilight zone where the respective powers of the state and Congress come together. It is in that zone where the regulation of public wharves falls. There it is true the state may not act in such a manner as to impose a burden upon interstate commerce, nor discriminate against it in favor of local trade. But that is not to deny the state's power of regulation. See, for example, *Conway v. Taylor's Exec.*, 1 Bl. 603, 17 L. Ed. 191 where the Court says:

> "Undoubtedly the states in conferring ferry rights may pass laws so infringing the commercial power of the nation that it would be the duty of this court to annul or control them. 13 How. 519, *Wheeling bridge case*. The function is one of extreme delicacy and only to be performed where the infraction is clear. The ferry laws in question in this case are not of that character. We can find nothing in them transcending the legitimate exercise of the legislative power of the state."

Or, as said in *Fanning v. Gregoire*, 16 How. 524, 14 L. Ed. 1043, in upholding the right of the State of Iowa to require a franchise for a ferry across the Mississippi River:

> "The argument that the free navigation of the Mississippi River guaranteed by the ordinance of 1787, or any right that may be supposed to arise from the exercise of the commercial power of congress, does not apply in this case. Neither

> of those interfere with the police power of the state in granting ferry franchises. *When navigable rivers within the commerce power of the union may be obstructed, one or both of these powers may be invoked.*" (Italics supplied.)

As has been indicated, no federal decision as yet has upheld the right of Congress to regulate the charge of any wharfinger. The most that can be said is that the decisions have held the question open. See, for example, *Transportation Co.* v. *Parkersburg*, 107 U. S. 691 (2 S. Ct. 732, 27 L. Ed. 584), where it is observed at page 701:

> "Now wharves, levees and landing places are essential to commerce by water no less than a navigable channel and a clear river but they are attached to the land; they are private property, real estate; and they are *primarily at least* subject to local state laws. Congress has never yet interposed to supervise their administration; it has hitherto left this exclusively to the states." (Italics supplied.)

It will be noted that the Court did not affirm the power of regulation by Congress.

On the contrary, several decisions of this Court affirmatively hold that the power of Congress and the states over the regulation of wharves is concurrent.

In *Cummings* v. *Chicago*, 188 U. S. 410, 23 S. Ct. 472, 47 L. Ed. 525, it was held that the jurisdiction of the federal government and the states in connection

with the granting of a wharf franchise was concurrent, that a wharf could not be built without the separate consent of the Secretary of War and of the City of Chicago.

In referring to that case, the Supreme Court, in *Montgomery* v. *Portland*, 190 U. S. 89 (23 S. Ct. 735, 47 L. Ed. 965), involving the same question, said, at 105:

> "In that case we recognized the doctrine as long established that the authority of a State over navigable waters entirely within its limits was plenary, subject only to such action as Congress may take in assumption of its power under the Constitution to regulate commerce among the several States. After referring to *Lake Shore & Michigan Railway* v. *Ohio*, 165 U. S. 365, 366, 368, (1896), we said that if Congress had intended by its legislation, prior to that decision, to assert the power to take under national control, for every purpose, and to the fullest possible extent, the erection of structures in the navigable waters of the United States that were wholly within the limits of the respective States, and to supersede entirely the authority which the States, in the absence of any action by Congress, have in such matters, such a radical departure from the previous policy of the Government would have been manifested by clear and explicit language. In the absence of such language it should not be assumed that any such departure was intended. We do not overlook the long-settled principle that

the power of Congress to regulate commerce among States is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the Constitution'. *Gibbons* v. *Ogden*, 9 Wheat. 1, 196; *Brown* v. *Maryland*, 12 Wheat. 419, 446; *Brown* v. *Houston*, 114 U. S. 630. But we will not at this time make any declaration of opinion as to the full scope of this power or as to the extent to which Congress may go in the matter of erection, or authorizing the erection of docks and like structures in navigable waters that are entirely within the territorial limits of the several States. Whether Congress may, against or without the expressed will of the States, give affirmative authority to private parties to erect structures in such waters, it is not necessary in this case to decide. It is only necessary to say that the act of 1899 does not manifest the purpose of Congress to go to that extent under the power to regulate foreign and interstate commerce and thereby to supersede the original authority of the States. The effect of that act, reasonably interpreted, is to make the erection of a structure in a navigable river, within the limit of a State, dependent upon the concurrent or joint assent of both the national Government and the State Government. The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such author-

ity, also obtain the assent of the State acting by its constituted agencies."

See also, *Willamette Bridge Co. v. Hatch*, 125 U. S. 1, 8 S. Ct. 811, 31 L. Ed. 629.

Similar is *North Shore Boom Co. v. Nicomen Boom Co.*, 212 U. S. 406, 29 S. Ct. 355, 53 L. Ed. 574, which involved the question as to which of two firms could build a lumber boom on a navigable stream at approximately the same location. Had both been built navigation would have been virtually impossible. Both had the approval of the Secretary of War. The state court held the defendant had not complied with state law, and was disqualified. The Supreme Court upheld this conclusion, and on the following grounds (page 412):

> "The river in question is a navigable stream, entirely within the State of Washington, and, in the absence of any statute by Congress, a State has plenary power in regard to such waters. Obstructions in those waters may be offenses against the laws of the State, but constitute no offense against the United States in the absence of a statute . . . Where there is a Federal law which it is claimed also applies to the subject and requires the consent of the Federal Government, then, there is a concurrent or joint jurisdiction of the state and National governments over the erection of a structure which obstructs navigation."

It is a far cry from a recognition of concurrent authority to the conclusion that one of the agents is subject to the other with respect to the same subject matter.

Insofar as regulation is concerned, there is a real distinction between a facility which is affixed to realty and which is, consequently, essentially local, and a locomotive or freight cars which may be within one state at a given moment and in another state within a few hours or a day. It is quite understandable that the powers of Congress should extend to the regulation of the latter type of transportation facility, and that in the former the power of the state should be recognized to be supreme. It may be admitted similarly that Congress might have the power to correct obstructions on the free flow of interstate commerce, as well as to prevent burdens upon it, but that is not to admit that the power inheres to any greater extent.

It should be emphasized that the foregoing authorities are concerned with a suggested conflict between the regulatory powers of the state and the regulatory powers of Congress as applied to the activities of a private individual.

As we have said, the matter of regulation of wharves falls within the twilight zone wherein the regulatory powers of the states and Congress come together. As to activities within this zone, is it not a tenable conclusion that Congress' power over the activities of an individual would not extend to those same activities if carried on by a state?

It is undeniable that the state's power to perform an act itself is subject to less doubt and not so susceptible

of attack than when it seeks to control the operations of a private person performing a similar act.

For example, the State of California is in the insurance business through its State Compensation Fund, writing workmen's compensation insurance. It may, if it desires, write that insurance at cost, making no profit from the business. Its power in this question cannot be questioned. On the other hand, it could not compel a private insurer to issue policies on that basis.

The point is that the state's power in performing an act is much greater than its power to regulate the performance of a similar act by others. And so, if we should concede for the purpose of argument that if the regulatory powers of the states and Congress over an individual operating wharves should come into conflict, the federal power would be called the superior, different considerations apply with regard to congressional control of the state itself performing the act attempted to be regulated.

The fact that the operation of wharves is a function of government seems of the utmost importance to counsel, notwithstanding the Court in the California case felt that it had no relevance to the facts then before it. To us it would seem that Congress' power to control a state activity would be much less clear if that activity were one traditionally carried on by the states and recognized as a prerogative of sovereignty from the days of the common law.

That the operation of a wharf is a governmental function as distinguished from a proprietary one cannot be doubted.

In the first place, practically all wharves are located waterward of the line of ordinary high tide and, consequently, rest upon tide and submerged lands which belong to the states by virtue of their sovereignty.

Shiveley v. *Bowlby*, 152 U. S. 1, 14 S. Ct. 548, 38 L. Ed. 341;

Borax Consolidated v. *Los Angeles*, 296 U. S. 10, 56 S. Ct. 23, 80 L. Ed. 9.

In particular, the lands upon which rest the facilities operated by the Board of Port Commissioners are tidelands granted to the City by the State of California by Statutes of California, 1911, p. 1254, Statutes of California, 1911, p. 1258 and other supplementary acts. The City holds these tidelands subject to a public trust as to the conditions of which the language in the last cited statute is typical, reading in part as follows:

> "Said lands shall be used by said City and its successors only for the establishment, improvement and conduct of a harbor and for the construction, maintenance and operation thereon of wharves, docks, piers, slips, quays and other utilities, structures and appliances necessary or convenient for the promotion and accommodation of commerce and navigation, and said City, or its successors, shall not, at any time, grant, convey, give or alien said lands, or any part thereof, to any individual, firm or corporation for any purposes whatever . . ."

The prohibition against alienation serves to illustrate the public concern that the State of California has in its harbors, for this interdict was surplusage. The Constitution of California, Article XV, Section 3, forbids the alienation of such lands into private ownership.

The idea that the operation of a wharf was a governmental function, one of special concern to the sovereign, goes back to the days of common law. In *De Portibus Maribus* (Hargrave's Law Tracts, p. 51), Lord Chief Justice Hale summarized:

> "Upon all these considerations it is evident that the king hath a special concern and interest in the franchise of a common port, and consequently from hence it is evident,
>
> "(1st) That no subject may institute or erect a common port without the charter of the king or a lawful prescription; and if he doth, the liberty or pretended liberty is seizable in *quo warranto* . . . ."

And, further, at page 73 of the same treatise, the Lord Chief Justice states:

> "The ownership of propriety is, where the king or a common person by charter or prescription is the owner of the soil of a creek or haven where ships may safely arrive and come to shore. This interest of propriety may, as has been shown, belong to the subject. But he hath not thereby the franchise of a port; neither can he so use or employ it, unless he hath had that liberty time out of mind or by the king's charter. Indeed, he may

bring thither for his own private use his own boats and vessels to carry off and bring in his own goods that are not customable, as fish, etc., but he may not use it as a public port or admit foreigners unless in case of necessity nor take toll anchorage there . . .

The principle is stated differently in *Talcott* v. *Pine Grove, supra*, the Court using this language:

. . "For all time the setting up of a highway or ferry for conveying persons and property has been deemed, in the common law, a franchise, a matter of governmental concern, a part of the subjects in the immediate possession of the political power, and, to exercise which, demanded a release of this right from the sovereign, by special grant or charter . . . The right to set up a ferry or a road, and the taking of tolls is one of them, and in this the public has an interest . . . It is said that, 'a franchise is a branch of the royal prerogative in the hands of the subject' such as the right of taking tolls for a bridge, way or wharf . . . A long list of state and federal judgments . . . show, beyond doubt, that these rights are held by the grantee as the agent and trustee of the political power; that they are in no sense private, but continue after, as well as before, the grant, to be but a portion of the public government . . .

"And it is not true, we submit, that it is in degree only, that these franchises differ in their relations to the public from mills and inns . . . The one is private property; *the other is a political function, which, when resting in the hands of*

> *the government where originally it resided*, or delegated still for the same public use, to either persons or corporations, ever has been, and of right may be, aided by taxation. Whether in the immediate possession of the sovereignty, or placed in legal organizations controlled by public law for the purpose, it is equally controlled by, and the political power has a voice in, its most minute regulation." (Italics supplied.)

In *Commissioner* v. *Ten Eyck*, 76 Fed. 2nd 515, the Circuit Court of Appeals for the Second Circuit reviewed the nature and character of port establishments throughout the world, both as of the present day and historically. In speaking of their current operation in Europe, it said:

> ". . . There the operations are not regarded as a proprietary or profit making activity of the Government, and where ports are under the supervision of Port Committees, operated usually at a loss, or, at best, earning only sufficient operating revenue to meet the cost thereof, and where the Committee, as such, controls and regulates the dock facilities and provides for warehouses, ferries and quays, the facilities are regarded as being under governmental control operated as a usual function of government . . . "

The Court thereafter considered the organization of ports of the United States and concluded with this language:

> "Therefore it is clear that the ownership, control and operation of port facilities are essentially usually prerogatives of sovereignties; espe-

> cially of the sovereignty of the constituent state Governments of the United States."

Consider the strong statement of the Supreme Court of the State of California in *Board of Port Commissioners* v. *Williams*, 9 Cal. 2d 381 (70 Pac. 2d 918), where it is said, at page 390:

> "It should be kept in mind at every step in the consideration of this proceeding that it is the paramount duty of government zealously to guard the public interest unhampered by private contracts which may hinder its control of or impair the full beneficial use of its harbor, ports, waterways and tide lands which are held in trust for the promotion and improvement of navigation and commerce."

The Circuit Court of Appeals for the Ninth Circuit has applied the principle in *Juneau Ferry & Nav. Co.* v. *Morgan*, 236 Fed. 204, and *Femmer* v. *City of Juneau*, 97 Fed. 2d 649. In the first case cited the Court held invalid a municipal lease of a wharf to the navigation company on the ground that it was the governmental duty of the city officials to operate the wharf directly and not to surrender it into private operation. The second case reaffirmed this principle but held valid an agreement which gave the navigation company merely a prior right to use the wharf, the city retaining control thereof, and having sufficient facilities left for the use of the general public.

To the same effect are *Kelly* v. *Selectmen of Fair-*

haven, 295 Mass. 113, 3 N. E. 2nd 241; *Cape Cod S. S. Co.* v. *Selectmen of Provincetown*, 295 Mass. 65, 3 N. E. 2nd 244; *State* v. *Coffeyville*, 127 Kan. 663, 274 Pac. 258; and *City of Daytona Beach* v. *Dygert*, 146 Fla. 352, 1 So. 2nd 170.

Considering, therefore, that the operation of wharves is a function of government, and considering further the important fact that these wharves are operated on land which the state owns by virtue of its sovereignty and in trust for purposes of commerce and navigation, it would follow that the state has a legislative, a sovereign discretion in such operation. In its very nature it must be unrestricted and uncontrolled except, perhaps, with respect to discriminations against, or burdens upon, interstate commerce. How, with any degree of logic, may it be conceded that the state as a sovereign may operate a wharf, admittedly upon lands which it owns as a sovereign, and yet recognize in Congress the right to regulate and prescribe the state's actions in carrying out those operations?

While in the foregoing discussion we have largely confined ourselves to a discussion of the power of the state in connection with the operation of wharves, the same observations and conclusions apply to a city engaged in a like activity. In its relation to the federal government the municipal corporation is the state. In *McQuillin on Municipal Corporations*, 2nd Ed., Section 343, it is said that it is "the settled doctrine" that "the city is to be regarded at all times as a mere creature and agent of the state."

Later in the same section the author states that "every act performed by" a municipal officer "as such officer is the act of the state."

The result is, therefore, that if Congress has no power to regulate the state in its operations of wharves, there is a similar lack of power as to any municipality to which the state has delegated this governmental function.

It is therefore respectfully submitted that the decision in *United States* v. *California*, *supra*, has no application to the facts now under consideration, and that Congress has no power to authorize the defendant Commission, or any other federal agency, to interfere with the operations of a state or one of its agencies on publicly owned wharves.

Point B. Congress Did Not Intend to Empower the Maritime Commission to Regulate State Agencies in the Operation of Wharves.

The precise point to be considered in this subdivision of the brief is whether or not Congress has included or intended to include a state or a state agency within the definition of the word "person" as used in the Shipping Act, 1916. (46 U. S. C. Secs. 801-842.)

It is the conviction of this Appellant that public bodies are not included within that definition because they are not mentioned therein.

The preliminary section of the Shipping Act, which contains the definition, reads in its pertinent part as follows:

> "The term 'other persons subject to this act' means any person not included in the term 'common carrier by water' carrying on the business of forwarding or furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water."

Again, we are not unmindful of the fact that the Supreme Court in *United States v. California, supra*, held that the state was within the operation of the federal Safety Appliance Act. Again we urge that decision is not controlling in the instant case. Each statute must be measured by its own length, regarded in the light of its background and legislative history, and in view of the evils Congress was trying to correct.

Thus, in *Ohio* v. *Helvering*, *supra*, the Court said:

> "Whether the word 'person' or 'corporation' includes a state or the United States depends upon the connection in which the word is found."

In considering whether or not a state was included within the definition of the word "person" under another statute, this Court recently said there was no hard and fast rule that governed.

> "The purpose, subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by use of the term, to bring state or nation within the scope of the law."
>
> *Georgia* v. *Evans*, 316 U. S. 159; 62 S. Ct. 972, 974; 86 L. Ed. 667.

Likewise, in *United States* v. *Cooper Corp.*, 312 U. S. 600, 604; 61 S. Ct. 742; 85 L. Ed. 1071, the Court held the United States was not a person within the meaning of the Sherman Act, entitled to sue for treble damages, saying:

> "Since, in common usage, the term 'person' does not include the sovereign, statutes imploying the phrase are ordinarily construed to exclude it. But there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history and the executive interpretation of the statute are aids to construction which may indicate an intent, by use of the term, to bring state or nation within the scope of the law."

It will be noted that in both of these cases, the phrase, "state or nation" is used, which negatives any contention that this rule of construction applies only to the enacting sovereign.

It is true that there is language in certain of the cases which so limits the rule, but the true rule is that it extends to any public agency or officer.

In *Balthaser* v. *Pacific Elec. Ry. Co.*, 187 Cal. 302, 305-6, 202 Pac. 37, 19 A. L. R. 452, that is made clear.

> "It must be conceded that the language of the Motor Vehicle Act in fixing speed limits, and regulating the use of public streets, is broad enough to apply to a motor fire-truck responding to a fire-alarm. But a familiar and fundamental rule of construction requires that this general language shall not be construed to apply to the government or its agencies unless expressly included by name. The general rule is stated by Blackstone as follows: 'I shall only further remark, that the King is not bound by any act of parliament unless he be named therein by special and particular words. The most general words that can be devised (any person or persons, bodies politic or corporate, etc.) affect him not in the least, if they may tend to restrain or diminish any of his rights or interests.' (Blackstone's Commentaries, Book 1, p. 261.)
>
> "Chancellor Kent states the rule as follows: 'It is likewise a general rule, in the interpretation of statutes limiting rights and interests, not to construe them to embrace the sovereign power or

government, unless the same be expressly named therein, or intended by necessary implication. (Kent's Commentaries, p. 460.)

"Associate Justice Story of the supreme court of the United States, sitting in the first circuit in the case of United States v. Samuel Hoar, 2 Mason 311, stated the rule as follows:

"'Now, I think, it may be laid down as a safe proposition, that no statute of limitations has been held to apply to actions brought by the Crown, unless there has been an express provision including it. For it is said, that, where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the king, in such case the king shall not be bound, unless the statute is made by express words to extend to him . . . And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation or exception, introduced for the public benefit, and equally applicable to all governments . . .

"'But, independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon the legislative intention. Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the

> acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary force to the government itself. It appears to me, therefore, to be a safe rule founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act . . . ' "

In *United States* v. *California*, *supra*, at 186, the Supreme Court said:

> "Respondent invokes the canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it . . . This rule has its historical basis in the English doctrine that the crown is unaffected by acts of Parliament not specifically directed against it . . . The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated . . . "

The Safety Appliance Act, 45 U. S. C., Secs. 1 *et seq.*, does not contain any definition such as that above quoted from the Shipping Act. Its language is of the broadest.

It was not concerned with the meaning of the word "person".

Section 6 provides:

> "Any common carrier engaged in interstate commerce by railroad . . . shall be liable . . . "

And Section 8 enacts that:

> "The preceding provisions and requirements of this chapter shall be held to apply to common carriers by railroad in the territories and the District of Columbia and shall apply in *all* cases . . . "(Italics supplied.)

On the other hand, the definition of "other person" in the Shipping Act is restrictive. After defining "other person" the act immediately proceeds to say what is meant by the word "person".

> "The term 'person' includes *corporations, partnerships and associations*, existing under or authorized by the laws of the United States, or any state, territory or District or possession thereof or any foreign country." (Italics supplied.)

The word "corporation" certainly does not include a state. In ordinary understanding it does not include a municipal corporation, and any extraordinary meaning is prohibited by the collocation of the word "partnerships" and "associations" which, by definition, are private business organizations. The rule of *ejusdem generis* applies.

It would be absurd to regulate a municipal corporation and not include other subordinate boards, agencies and districts of a state which obviously are not comprehended in the word "corporations" or in any other

definition of the word "persons" given in the Shipping Act.

In discussing the contention that a municipal corporation should be included in the meaning of the word "corporation", it is said in *McQuillin on Municipal Corporations*, 2nd Ed., Sec. 106, quoting in part from *Nashville v. Ray*, 19 Wall. 468 (22 L. Ed. 164) at 475:

> "It hardly need be said that this view has never been favored by the law nor has it influenced judicial decisions. Early the Supreme Court took the position that the city is a public institution created for public purposes only and hence has none of the peculiar qualities characteristics of a trading company instituted for the purposes of private gain, except, of course, that of acting in a corporate capacity. With emphasis this tribunal says: 'Its objects, its responsibilities and its powers are different.' Private corporations are the private property of the corporators. They are designed to regulate the private interests and exist only for private gain. The object of the city or town is governmental, not commercial. It is 'organized not to make money but to spend it'. 'Private gain, trading, speculation or the derivation of pecuniary profits are not the purposes or objects within the contemplation of the charter; and no powers are conferred to stimulate, encourage or advance such purposes further than the incidental encouragement and advancement which may follow a prudent exercise of the powers of local government'."

The statements in *United States* v. *California*, above noted, where the statute under consideration was said to be "all-embracing" do not apply in such situation. The Shipping Act is not "all-embracing". It is primarily a regulation of carriers by water. Such regulation of wharfingers as may be effected by it is purely incidental to the larger purpose. And, as will be demonstrated, even that incidental regulation is severely restricted.

Therefore, the ordinary rule of construction is proper as recognized in *Guarantee Co.* v. *Title Guaranty Co.*, 224 U. S. 152; 32 S. Ct. 457, 56 L. Ed. 706, approving *United States* v. *Herron*, 20 Wall. 251, 255, 22 L. Ed. 275, where it is said:

> " . . . The sovereign authority of the country is not bound by words of a statute unless named therein, if the statute tends to restrain or diminish the powers, rights or interests of the sovereign", calling this the "settled rule".

Now there is a real reason for not intending to include public bodies within the scope of a statute prohibiting discrimination and requiring the assessment of reasonable rates.

State and local public officials charged with administering wharf facilities are required as a matter of fundamental local law not to discriminate and to charge no more than reasonable rates.

Consequently, there was no reason for Congress to include such public bodies. They were already under the

restrictions Congress was now imposing upon private enterprise.

Another most unusual result will obtain if we conclude that Congress meant to bring municipalities within the meaning of the word "person". Witness Section 32 of the Shipping Act, 1916, which reads as follows:

> "That whoever violates any provision of this Act, except where a different penalty is provided, shall be guilty of a misdemeanor, punishable by a fine not to exceed $5,000."

If the word "person" means the City of Oakland, among others, then this Appellant has been guilty of a continuing misdemeanor since the enactment of the Shipping Act, in failing to file with the Shipping Board, and its successors, the lease entered into with Howard Terminal in 1914. The Commission, in the order under attack, has concluded that that lease is of the type of agreement contemplated by Section 15 of the Act which must be filed with and approved by the Commission.

Thus we are faced with the spectacle of a municipal corporation being guilty of a crime because of the performance of an act regarded as lawful for nearly a quarter of a century.

An examination of the legislative history of the Shipping Act, 1916, throws considerable light upon the purposes Congress meant to achieve, the evils it wanted to remedy, in enacting that legislation.

The United States Merchant Marine had fallen into a sorry state; practically all of the nation's foreign commerce had been carried on foreign bottoms; and domestic shipping had been strangled by railroad competition. The advent of the first World War and its preliminary foreshadows brought home to the nation this realization.

An investigation was begun in the House of Representatives pursuant to a resolution introduced in the 62nd Congress on February 24, 1912, authorizing the House Committee on the Merchant Marine and Fisheries to report to the House on the subject after thorough study. That report became H. R. Document No. 805, 63rd Congress, Second Session. In its prefatory note, the report recites the beginning of the investigation and goes on to say:

> " . . . But it was later deemed expedient to broaden the scope of this resolution so as to extend the investigating powers of the Committee to every possible transportation agency (such as forwarding, dock, terminal and all other companies and firms) which might be connected in any way with foreign or domestic water carriers, or with railroads, and a knowledge of which might be essential in ascertaining the full relationship between the navigation companies themselves as well as between such companies and the railroads . . . "

It is interesting to note that the only references in the report relative to terminal facilities concern railroad control of them.

For example, on page 323 of the report it is said:

> "But even if independent carriers could manage to overcome all other obstacles, the railroads are still in a position to effectively control independent water carriers by refusing to give them the benefit of their dock facilities at Buffalo both for the discharging and receiving of cargo, the independent carriers thus being required, in addition to the other disadvantages already enumerated, to unload at some other dock and team the goods to or from the railroad station. To make the situation worse, the railroads have secured nearly all the water frontage in Buffalo available for dock purposes . . . ."

The report thereafter summarizes the devices then existing for control of competition and lists among other things the following (at pp. 409, 410, 411 and 412, respectively):

> "(9) Railroad or steamship company ownership of exclusive terminal facilities . . .
>
> "(17) A railroad or its controlled water line or terminal company holds all the available docks and shed and piers and refuses access to an independent line . . .
>
> "(18) A railroad or its controlled water line owns the available water frontage which it refuses to utilize, at the same time refusing to release the same by sale or otherwise . . .
>
> "(25) Railroads can give access to docks to preferred water lines with which they have special arrangements, thus forcing shippers by other

water lines to pay a series of charges for switching, docking and unloading, and putting them to much inconvenience. In effect it means that the shipper who wishes proper service must use the water line preferred by the railroad."

The only recommendation of the Committee with respect to terminal facilities is found on page 424 of the report where it is said:

"(10) That railroads be required to make their terminal facilities available to water carriers on equal terms and under such reasonable conditions as the Interstate Commerce Commission may prescribe. The Committee also believes that the Federal Government should pursue a policy of not expending money in the interest of any port for harbor or channel improvements, unless that port has sufficient dock facilities available to all water crariers."

It will thus be seen that the problem Congress was considering did not in any way extend to publicly owned and operated terminal facilities, nor, indeed, to privately owned wharves, which were operated as public utilities and open to all alike. From this report grew the legislation that became the Shipping Act, 1916.

Since the enactment of the Shipping Act, Congress consistently has indicated that it did not believe it had attempted to regulate public agencies. Striking evidence of that belief is afforded three years after the enactment of the Shipping Act. Chapter 95 of the 65th Congress,

Third Session, (40 Stats. at L. 1286) provides as follows:

> "It is hereby declared to be the policy of the Congress that water terminals are essential at all cities and towns located upon harbors on navigable waterways and that at least one public terminal should exist, constructed, owned, and *regulated* by the municipality or other public agency of the state and open to the use of all on equal terms . . . ." (Italics supplied.)

It is submitted that the use of the italicized word "regulated" in that statute cannot be construed consistently with any understanding on the part of Congress that it had already subjected wharves operated by municipalities or other public agencies of the state to regulation by the Shipping Board.

That the use of the word "regulated" was not inadvertent, as demonstrated by the following language of Section 8 of the Merchant Marine Act of 1920, where it is said:

> "And it shall be the duty of the board in cooperation with the secretary of war, with the object of promoting, encouraging and developing ports and transportation facilities *in connection with water commerce over which it has jurisdiction* . . . . to investigate the subject of water terminals including the necessary docks, warehouses, apparatus, equipment and appliances in connection therewith, with a view to devising and *suggesting* the types most appropriate . . . . *to*

> *advise with communities* regarding the appropriate location and plan of construction of wharves, piers and water terminals . . . " (Italics supplied.)

In the first place, it will be noted that the phrase "over which it has jurisdiction" does not limit the phrase "ports and transportation facilities" but relates to "water commerce". The connotation is definite that Congress was not asserting any jurisdiction over wharves, either in itself or in its subordinate, the Shipping Board. Secondly, the use of the words "suggesting" and "advise what communities" is certainly not the language of a master speaking to a subordinate, but is, rather, that to be expected between equals dealing on a basis of comity. Every inference that can be drawn from this statute leads to the conclusion that Congress did not understand that it had in any way attempted to regulate the state or local communities who were providing wharf facilities for the public good.

Resort to statutes *in pari materia* is often helpful in discovering what the legislature had in mind in using a certain phrase. The Shipping Act, 1916, has often been held to be *in pari materia* with the Interstate Commerce Act, 24 Stat. at L. 379.

Part III was added to the Interstate Commerce Act by the Transportation Act of 1940. Part III deals with the regulation of water carriers in domestic commerce, and transferred jurisdiction over them from the Maritime Commission to the Interstate Commerce Commission.

The part had its inception in S. 1632, introduced in 1935. In its original form the bill provided for the regulation of both water carriers and wharfingers. The wharfinger provisions were eliminated and the bill was introduced in the succeeding session as S. 1400 and subsequently became Part III of the Transportation Act of 1940.

In its original form S. 1632 defined the term "person" as follows:

> "The term 'person' includes any individual, firm, copartnership, corporation, company, association, joint stock company *or body politic.*" (Italics supplied.)

The italicized words were amended out of the bill, and no other assumption is possible than that this deletion was deliberate. Certainly, the framers of the original draft did not believe that the word "person" would include a body politic unless the latter were expressly designated. Just as certainly it must have been the opinion of Congress that by eliminating the italicized words the operation of the states and their political subdivisions were not covered by the bill.

The conclusion is further strengthened by the fact that the very same Transportation Act of 1940 that contains Section 302 (which is the section defining "person") amended Section 13 of Part I of the Interstate Commerce Act. Its pertinent language reads thusly:

> "That any person, firm, corporation, company or association or any mercantile, agricultural or

> manufacturing society or other organization *or any body politic or municipal organization*"

may file a petition with the Commission. (Italics supplied.)

Certainly, Congress did not think public bodies were included within the meaning of "person" or "corporation" in connection with Section 13. If it had, there was no reason for retaining the italicized words when the section was amended. It is not reasonable to presume a different concept in connection with Section 302.

Under date of January 21, 1936 the Interstate Commerce Commission transmitted to the President and the Congress the Fourth Report of the Coordinator of Transportation (House Document No. 394, 74th Congress). The Coordinator said, in part:

> "The only certain means of correcting these conditions is federal regulation and such regulation is in reality a logical and essential part of federal regulation of water carriage in general. It was for this reason that the provisions for the regulation of 'wharfingers' were included in the original draft of S. 1632 at the last session of Congress. The same purpose can be served, however, by the separate bill now recommended."

Thereafter, the report stated as follows:

> "The separate bill now recommended for the regulation of 'wharfingers' is being prepared after numerous conferences with interested parties. As in the case of the water carrier bill now before the

Senate, the intent is to meet all serious objections which can be met without the sacrifice of principle. The bill will be ready for presentation at an early date."

Thereafter, under date of March 26, 1936, the Coordinator issued a press release stating in part:

"It is also quite generally agreed that legislation for the regulation of wharfingers should be contingent upon legislation for the adequate regulation of water carriers, and it still remains for Congress to act upon the latter legislation. In the circumstances, the Coordinator is of the opinion that nothing would be gained by attempting to press the issue of wharfinger regulation at the present session, and will be governed accordingly."

It is evident from the foregoing excerpts that the Coordinator in 1936 was of the opinion that there was then on the statutes no measure for the regulation of wharfingers.

We do not mean to suggest that the Court is bound by the interpretation of the Federal Coordinator nor by the opinion of port operators or the understanding of the members of the Maritime Commissions' predecessor boards; but these things are pertinent in arriving at the intent of Congress if, upon the reading of the sections of the Shipping Act involved, that intent seems ambiguous.

The general policy with respect to congressional interference with municipal activities also should be considered.

In statutes such as the Wagner Act, 49 Stats. at L. 449, the Social Security Act, 49 Stats. at L. 220, the Wages and Hours Act, 59 Stats. at L. 1069, and other statutes of like character, specifically provide that they shall not apply to public agencies.

On the other hand, when Congress has meant to include a state or municipal corporation within the scope of a statute, it has generally clearly so indicated. For example, we find the following:

> "States . . . and municipal subdivision thereof." (50 U. S. C. 124.)
>
> "Any state . . . or political subdivision thereof." (7 U. S. C. 702 dd.)
>
> "Any state, municipality, corporation, firm, district or individual." (48 U. S. C. 395.)

These factors sufficiently demonstrate that the City of Oakland is not an "other person" amenable to the jurisdiction of the Maritime Commission.

But other considerations lead to the same conclusion. We have pointed out that the officials charged with the enforcement of the Shipping Act, 1916, made no effort to regulate the rates of any wharfinger, let alone a public body, under the provisions of that statute.

The rule that contemporaneous construction is always the best is so well known as not to require the discussion of authorities. See, for example, *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740, 51 S. Ct. 297, 75 L. Ed. 672; *Pocket Veto Case*, 279 U. S. 655, 49 S.

Ct. 463, 73 L. Ed. 894; and *Boston & M. R. Co.* v. *Hooker*, 233 U. S. 97, 34 S. Ct. 526, 58 L. Ed. 868.

Reverting once more to a discussion of *United States* v. *California*, *supra*, there are certain other differentiating factors.

We have pointed out that a wharf is primarily local, whereas a railroad is essentially national, its apparatus being easily transportable from state to state.

In addition to that, railroads from their earliest days have been conceded to be objects of federal regulation, even as respects intimate details of their intrastate operations because of the effect upon interstate commerce.

On the other hand, until the Maritime Commission first asserted jurisdiction no one has conceived that Congress ever attempted to regulate wharves to any extent.

Furthermore, in the case of railroads, the great preponderance of track mileage is privately owned and operated, and that which is controlled by the public is infinitesimal in comparison. Contrariwise, in the case of wharves, the great majority of them are operated by the states or by their agencies, compared with the much smaller number which are under private control.

Bearing these factors in mind, it is perfectly consistent to hold that in enacting a general statute governing safety appliances on railroad equipment, Congress intended to comprehend equpiment that was operated

and owned by a state or one of its subdivisions, while, at the same time, believing that Congress did not intend to subject a state agency operating wharves to a general statute without specifically mentioning the state or its agency. The circumstances to which each particular statute applies must be considered if we are to discover the true congressional intent.

Under the circumstances, and because of the considerations enumerated, it is respectfully submitted that Congress did not intend to subject a state or municipal corporation to the jurisdiction of the Maritime Commission or its predecessors in enacting the Shipping Act, 1916.

Point C. The Maritime Commission Has No Jurisdiction Over the Rates of Any Wharfinger.

Independently of any question of constitutional power on the part of Congress, and independently of whether or not Congress has included public bodies in the definition of the phrase "other person", the Maritime Commission has no jurisdiction over the rates, limited as such, of any wharfinger, whether *publicly* or *privately* owned.

It should be remembered that the Maritime Commission is one of limited jurisdiction and, like the Interstate Commerce Commission, its powers are strictly statutory.

New England Divisions Case, 261 U. S. 184; 43 S. Ct. 270; 67 L. Ed. 605.

The Commission in its final report and order makes it clear it realizes it has no general power to fix the rates of wharfingers. This cannot be emphasized too strongly.

But the Commission has tried to circumvent this restriction by denominating the assessment of complainant's wharf storage rates a "practice" and by calling them unduly prejudicial and preferential and unreasonable in violation of Sections 16 and 17 of the Shipping Act.

We have stated heretofore that whatever power the Shipping Act gave the Commission over wharfingers was fragmentary and purely incidental. An examination of the statute corroborates that statement. Of its original 44 sections, the phrase "other person" appears only in

Sections 15, 16, 17, 20 and 21. Section 15 has no relation to rates or practices, being concerned with agreements and will be discussed in a later section of this brief. Section 20, prohibiting the disclosure of confidential information, and Section 21, relating to records and the production of information, are not involved in this proceeding.

Section 16 reads as follows:

> "Section 16. That it shall be unlawful for any common carrier by water or other person subject to this act, either alone or in conjunction with any other person, directly or indirectly—
>
> "First. To make or give any undue or unreasonable preference or advantage to any person, locality or description of traffic in any respect whatsoever, or to subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.
>
> "Second. To allow any person to obtain transportation for property at less than the regular rates then established and enforced on the line of such carrier, by means of false billing, false classification, false weighing, false report of weight or by any other unjust or unfair device or means.
>
> "Third. To induce, persuade or otherwise influence any marine insurance company or underwriter or agent thereof not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo having due regard to the class of vessel or cargo as is granted to such carrier or other person subject to this act."

There is no charge in the report and order of the Commission, nor any assertion on the record, that this Complainant has violated the second or third paragraphs of Section 16. Therefore, we are concerned only with the pargaraph numbered First.

Section 17 provides as follows:

> "That no common carrier by water in foreign commerce shall demand a charge or collect any rate, fare or charge which is unjustly discriminatory between shippers or ports or unjustly prejudicial to exporters of United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare or charge is demanded, charged or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging or collecting any such unjustly discriminatory or prejudicial rate, fare or charge.
>
> "Every such carrier and every other person subject to this act shall establish, observe and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable, it may determine, prescribe and order enforced a just and reasonable regulation or practice."

The Court cannot fail to note the difference between the first and second paragraphs of Section 17. The first paragraph is limited to *common carriers by water in*

foreign commerce. The second paragraph refers to "every such carrier and every other person subject to this act".

Since the phrase "other person" appears in the second paragraph and does not appear in the first, all rules of construction, and common sense, tell us that the provisions of the first paragraph do not apply to such "other persons".

Note, also, that the first paragraph of that section deals with rates, fares and charges, whereas the second paragraph is concerned with regulations and practices. From this it must be concluded that Congress did not intend to regulate the rates of wharfingers in connection with foreign commerce and that it regarded a rate as something different from a practice, and did not include it within that term. Had there been any different intent there would have been no need to have divided the section into two paragraphs.

If any argument were needed to demonstrate that proposition, the act itself furnishes it in Section 18.

We must remember that Section 17 deals with the regulation of foreign commerce and Section 18 with interstate commerce.

Section 18 reads as follows:

> "Section 18. That every common carrier by water in interstate commerce shall establish, observe and enforce just and reasonable rates, fares, charges, classifications and tariffs and just and rea-

sonable regulations and practices relating thereto and to the issuance, form and substance of tickets, receipts, bills of lading and the matter of presenting, marking, packing and delivering property for transportation, the carrying of personal, sample and excess baggage, the facilities for transportation and all other matters relating to or connected with the receiving, handling, transporting, storing or delivering of such property.

"Every such carrier shall file with the board and keep open to public inspection, in the form and manner and within the time prescribed by the board, the maximum rates, fares and charges for or in connection with transportation between ports on its own route; and if a through route has been established the maximum rates, fares and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

"No such carrier shall demand, charge or collect a greater compensation for such transportation than the rates, fares and charges filed in compliance with this section except with the approval of the board and after ten days' public notice in the form and manner prescribed by the board, stating the increase proposed to be made; but the board for good cause may waive such notice.

"Whenever the board finds that any rate, fare, charge, classification, tariff, regulation or practice demanded, charged, collected, or observed by such carrier is unjust or unreasonable it may determine, prescribe and order enforced, a just and

reasonable maximum rate, fare or charge or a just and reasonable classification, regulation or practice."

For our purposes, the first paragraph alone of Section 18 will suffice.

In the first place, the Court will note that the phrase "other person" does not appear in the entire section. Secondly, it will be seen that Congress has combined the matter of rates, fares and charges, which appeared in the first paragraph of Section 17, with reasonable regulations and practices, which appeared in the second paragraph of that section. From this it is fairly to be inferred that Congress had a reason for dividing Section 17 into two paragraphs, and to treat the persons included in the second paragraph in a different manner from those included mentioned only in the first.

The design of Sections 17 and 18 and, indeed, the entire structure of the Shipping Act, show that Congress intended to treat it differently the various transportation agencies over which it assumed jurisdiction.

In the first place, carriers engaged in interstate commerce were in competition with railroad carriers engaged in that commerce. The railroads were subjected to a high degree of regulation by the Interstate Commerce Commission; and it was only fair that their competitors, the water carriers, should be subjected to like regulation by the water carrier administrative agency.

In the case of water carriers engaged in foreign commerce, there was, in the main, no such factor of competition. There was involved, also, the matter of international law and international comity and consequently one would expect to find carriers engaged in this service subjected to a lesser degree of regulation than were carriers engaged in interstate commerce. It would have been difficult, without international repercussion, to have fixed the rates of foreign carriers. All that Congress could insist, with any graceful regard for the rights and powers of foreign governments, would be that these foreign carriers treat American shippers on as fair a basis as they treated the shippers of their own nation. And, as Section 17 demonstrates, that is all that Congress tried to do.

The third transportation agency brought within the provisions of the act, being those included within the term "other person", was intended to be subjected to an even lesser degree of regulation than were the carriers in foreign commerce.

The Shipping Act, 1916, cannot be called comprehensive by any stretch of the imagination. Compared to the Interstate Commerce Act, it is shadowy and insubstantial. The regulations it imposes are only partial. For instance, there is no requirement that a certificate of convenience or necessity be obtained by any person before embarking in the business of carriage by water or, for that matter, for the erection or operation of a

public wharf. Nor, if a service is once established, may the carrier be compelled to continue.

McCormick Steamship Co. v. *U. S.* 16 Fed. Supp. 45.

The rates charged by foreign steamship lines are not controlled and the Government seems to concede that is also true of the rates as such of terminal operators.

Until the enactment of the Intercoastal Shipping Act, 1933, (47 Stat. 1425; 46 U. S. C. Sec. 843) there was no requirement that the carriers file their tariffs, that they should give notice of tariff changes and that they should not depart from the rates so fixed. The scope of regulation was increased somewhat by the enactment of the Merchant Marine Act of 1936 and it was not until 1938, with the enactment of the Act of June 23, 1938 (52 Stat. 964, 46 U. S. C. Sec. 845a) that the Commission had any power to fix minimum rates.

Therefore, it is most inaccurate to call the Shipping Act, 1916, as originally enacted, a comprehensive statute, and worse, to reason from that premise that Congress must have intended to include every activity of every person who was connected in any way with the shipping industry.

In connection with wharf storage rates, what the Commision has done, in effect, is to prescribe *minimum rates* to be observed at the terminals of San Francisco Bay. This it may not do.

It had no power to do so in connection with water carriers before the passage of the Act of June 23, 1938, above referred to, which amended the Intercoastal Shipping Act, 1933. The last named statute was amendatory of the Shipping Act, 1916.

The administrator of the Shipping Act, 1916, could not prescribe rates. That was left for the initiation of the carrier. Section 3 of the Intercoastal Shipping Act (46 U. S. C. Sec. 845) expressly provided, in its last sentence:

> "Nothing herein contained shall be construed to empower the board affirmatively to fix specific rates."

That provision was eliminated by Section 903d of the Merchant Marine Act, 1936 (49 Stat. 2016); but it served to throw light on the congressional philosophy underlying the Shipping Act and its amendatory statutes.

It was not until 1938, as we have seen, that the power to enforce minimum rate schedules as given to the Commission; and that power was restricted to carriers, and to only a certain limited class of carriers. There is not a word about "other persons".

It should be remembered that the Intercoastal Shipping Act applies only to water carriers in interstate commerce "by way of the Panama Canal". The Act of 1938 adds Sections 4 and 5 to that statute which reads as follows:

> "Sec. 4. Whenever the Commission finds that

any rate, fare, charge, classification, tariff, regulation, or practice demanded, charged, collected, or observed by any carrier subject to the provisions of this Act is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum or minimum, or maximum and minimum rate, fare, or charge, or a just and reasonable classification, tariff, regulation or practice: *Provided*, That the minimum-rate provision of this section shall not apply to common carriers on the Great Lakes.

"Sec. 5. The provisions of this Act are extended and shall apply to every common carrier by water in interstate commerce, as defined in section 1 of the Shipping Act, 1916."

It will be observed these sections give the Commission no jurisdiction to fix minimum rates for carriers in foreign commerce or on the Great Lakes nor in the case of "other persons". This statute is the most recent expression of Congress in respect to the power of the Maritime Commission over rates. The failure to include "other persons" must be deemed deliberate. It is a reaffirmation of the policy of the Shipping Act, 1916, wherein, as we have shown, the sections granting authority over rates, Sections 17 and 18, exclude those of wharfingers. It shows that Congress in 1938 did not believe the Commission had any such existing power.

Now, with this background, let us examine the final report of the Commission and observe the means by which the Commission seeks to evade that policy.

Preliminarily, its efforts fall into two lines. First, it says, wharf storage is furnished below cost; the result is that users of other services of Appellant must do one of two things: (1) assume the burden of the loss so sustained, or (2) be denied hope of a downward revision. From this it is reasoned that these users of other services are being discriminated against, and that violence is done to sections 16 and 17 of the Shipping Act, 1916.

Secondly, the Commission says that what it really is trying to regulate is free time (which subject will be considered in a later part of this brief), and that if, after the expiration of free time, low wharf storage rates are permitted to apply, the regulation of free-time is thwarted *pro tanto*.

To illustrate, the following are excerpts from the report:

> "Wharf demurrage is the charge accruing on cargo left in possession of the terminal beyond the free time period. The question here is whether respondents are unduly discriminating between such cargo and that removed during the free time period. The principal evidence on this point is an analysis of the cost of providing wharf storage to determine whether that class of service is self-sustaining *or is furnished at rates so low as to cast a burden upon other services.*" (Italics supplied.) (R., p. 26.)
>
> "' . . . As will be demonstrated, the present rates as a whole produce revenues which are far

below the cost of the service as computed according to the Edwards-Differding formula. The general theory of this formula is that the responsibility of providing adequate revenues for essential terminal facilities rests upon the cargo and the carrier. The charge for each service is made to cover the direct cost incurred in rendering the service and some portion of the joint or overhead cost which are properly attributable to it." (R., p. 29.)

The Commission thereupon applies the so-called Edwards-Differding formula and concludes:

"The foregoing analysis of costs shows unmistakably that users of wharf storage service are not providing their proper share of essential terminal revenues. It must be apparent also that a disproportionate share of this burden is being shifted to users of other terminal services whose charges are based on rates considered to be reasonable in 1935." (R., p. 32.)

"The next question is whether granting storage at non-compensatory rates is unduly preferential and prejudicial in violation of section 16 of the Shipping Act, 1916, and an unreasonable practice in violation of section 17 thereof. The storage cases previously mentioned, 1 U. S. M. C. 676 and 2 U. S. M. C. 48, establish two propositions. First, the furnishing of free storage facilities beyond a reasonable period results in substantial inequality of service as between shippers. Clearly the furnishing of such facilities at non-compensatory rates is merely a less serious form

of the same offense. Second, any preferred treatment by charges or otherwise of certain classes of cargo results in a discrimination against other cargo." (R., p. 33.)

And, lastly, it is said:

"Oakland contends there can be no discrimination since the rates are open to all shippers alike. In a sense this is true. However, the commercial practices of those shippers who supply the major portion of tonnage handled by respondents obviously do not permit of their placing their goods in storage. Furthermore, it should not be overlooked that the practice of furnishing one service below cost has a tendency to prevent any downward revision of rates for other services however justified they may be. Clearly such a practice is unreasonable.

"The decisions cited are ample authority for condemning the existing wharf storage rates and practices as being in violation of sections 16 and 17 prohibiting undue prejudice and unreasonable practices." (R., p. 35.)

At this time let it be observed that while the hearing in Docket 555 attracted a widespread interest in the shipping, water carrier and water terminal industries, not one shipper testified in the proceeding on the subject of wharf storage rates. Not one representative of any steamship line testified in that regard.

That indicates that there was no very great concern on the part of either the shippers or the water carriers

as to the level of the existing wharf storage rates. It would seem to indicate that none of them felt themselves to be prejudiced or subjected to an unreasonable practice. The Court is well aware of the ever-present ability of shippers and of shippers' organizations to raise their voices high when they feel that a particular rate or practice is prejudicial to their interests.

What the Commission was concerned with at the hearing, and what its report plainly shows it was driving at, was a determination of whether or not the existing rates were *compensatory*. It was not worrying about any discrimination as between shippers or prejudice to certain of them. When it came to write its report and order it tried to find a legal means for doing something that Congress had not given it power to do, namely, to order the publishing of wharf storage rates on a basis which it believes to be *compensatory*. If the Commission can do this under guise, it may by similar subterfuge control every other rate of wharfingers and thus take upon itself powers Congress has not given it. This will be usurpation.

This point cannot be emphasized too strongly. To achieve its end, the Commission mouthed the words of this Court in *Baltimore & Ohio R. R. Co. v. United States*, 305 U. S. 507, 59 S. C. 284, 83 L. Ed. 318. The conclusions of law which it attempted to dress up as findings of fact, and so to preclude any effective review, are modelled carefully after the language of that case.

We concede the validity of that decision. We affirm the principles it announces. We deny its application, in any respect, to the facts disclosed by the record or, for that matter, by the report of the Commission itself.

The Baltimore & Ohio case was one involving two activities of railroad carriers condemned by the Interstate Commerce Commision in *Ex parte* 104, *Part VI, Warehousing and Storage of Property by Carriers at the Port of New York, N. Y.*, 198 I. C. C. 134; 216 I. C. C. 291 and 220 I. C. C. 102.

The first of these practices consisted in furnishing uptown warehouse space to certain large shippers, which service was not included in the carriers' tariff; and which was less than the rate charged other shippers for identical space. The essence of the Commission's decision is found in the 216 Volume at page 340, where the Commission says:

> "We find that the leasing of space to shippers for storage of the particular description of traffic here involved, *which results in said shippers paying a lower storage rate than is charged other shippers for space identical in all respects* constitutes a device whereby respondents engaged in unjustly discriminatory and unduly preferential practices forbidden by sections 2 and 3 of the act. The space here discussed is leased from respondents and used for storage which is a necessary and component part of the commercial activities in connection with the handling and distribution of flour. This storage is not a part

of transportation as defined in the act. The space therefore is not such as is properly the subject of tariff publication but must be governed by the principle announced in *Leases and Grants by Carrier to Shipper, supra;* Cf. *Wharfage Charges at Atlantic and Gulf Ports,* 157 I. C. C. 663, 691. Respondents by paying for or assuming the cost of such commercial service *depart from their published transportation rates and charges* in violation of section 6 of the act." (Italics supplied.)

It is not contended in the instant proceeding this Appellant or any other Respondent in Docket 555 did not publish its wharf storage rates in its tariff, or that it failed to observe the published rate. Therefore, this portion of the New York case has no cogency in the present proceeding.

The second practice complained of related to the charges on the storage-in-transit privilege afforded certain commodities, such as wood pulp and rubber. Storage-in-transit is the privilege of moving goods from one point to another under one bill of lading with storage for a certain maximum period permitted at some intermediate point. The freight charge assessed by the carrier is the same as if the movement had been continuous and did not, in fact, constitute two separate movements. The in-transit privileges in question were set up in the carriers' tariffs, but they were limited to these certain commodities with much higher rates for the same privilege being charged against other commodities.

The basis of the Commission's holding this charge

to be a violation of the Interstate Commerce Act is two-fold. In the decision last referred to, at page 341, it is discussed, and the Commission says:

> ". . . . Our discussion of those commodities herein is only illustrative as the record is clear that those and other commodities are stored under circumstances which are not bona fide transit arrangements necessarily related to transportation services which it is the duty of the respondents to perform. The circumstances and practices referred to are part of the business necessary in conducting a commercial warehouse enterprise. The engagement by the carriers in commercial warehousing under circumstances described of record affects the performance of their common carrier duties and is of such character as to result in the violation of the act which we are charged with administering . . . ."

And, continuing, at pages 341 and 342:

> "Goods, including rubber stored under the so-called transit tariff are loaded from shipside and moved to warehouses under local rates. The goods remain in storage under so-called 'expense bills'. If shipped outward outbound from storage within the transit period a refund is made of the local inbound freight rates since the same through rate applies from shipside as from the warehouse."

And further, at pages 342, 343:

> "In appendix III to the prior report the loss per ton on freight stored under the in transit tariffs by the trunk line respondents during the

year 1931 in the port of New York district is shown. The losses range from $1.28 to $6.18 per ton and then as now a large percentage of tonnage stored consisted of crude rubber. In most cases it is not contended on this record that the rates under in transit tariffs compensate the carriers for the cost of storage and handling. No pretense is made that the storage and handling rates on crude rubber and wood pulp are compensatory and one prominent witness for respondent when asked if he knew the *out of pocket loss incurred* in the storage and handling of crude rubber testified 'I know that those things do not in themselves pay for handling the traffic'. This witness in effect admitted that *the 'storage costs, without considering the handling costs, exceed the revenues derived from the two services.*" (Italics supplied.)

In other words, the Commission found that the carriers were, in effect, giving a concession to large shippers by performing a function not within their duties as a carrier by rail, and *furnishing this service at an out-of-pocket loss*, thereby casting a burden upon other customers of the carriers to whom this special service was not available.

There can be no question of the soundness of the decision of the Interstate Commerce Commission on the facts presented to it; nor of the decision of the Supreme Court in upholding the Commission.

That, however, does not give comfort to the Maritime Commission. We have shown that the first violation

charged the New York carriers does not exist in this case, and it is likewise true that the second does not.

In the first place, the operation of a public wharf has a two-fold aspect. The public wharfinger is not a carrier. As to certain of his functions he operates as the agent of the carrier, and as to certain others of his functions he operates as the agent of the shipper or consignee. Storage, as has been indicated by the decision of the Interstate Commerce Commission above referred to, is not part of transportation and, consequently, is not a transportation service. It is, nevertheless, one of the recognized functions of the public wharfinger. The second element shown to exist in connection with the second charge against the New York carriers was that the rates did not meet the out-of-pocket expense of the carriers.

The Court will note that there is not one word in the final report of the Commission or in its order which mentions out-of-pocket costs. There is not one iota of testimony, there is not a single exhibit which the Commission had before it when it decided this docket, as to what the out-of-pocket costs of handling wharf demurrage are.

This issue of out-of-pocket costs is determinative of this appeal.

Unless the fact is that Appellant does not meet its out-of-pocket expenses in connection with wharf storage, *no burden is thrown on users of other services.*

no discrimination is made to appear, and the house of cards built by the Commission tumbles.

At the outset, certain observations of Mr. Justice Brandeis in *Skinner & Eddy Corp. v. United States*, 249 U. S. 557, 63 L. Ed. 772, 39 S. Ct. 375, are helpful in considering the limits of authority of the Maritime Commission in issues such as those presented here. The opinion deals with the powers of the Interstate Commerce Commission, but we have seen that the act to regulate commerce is much broader in scope than the Shipping Act, 1916 and, consequently, the power of the Maritime Commission is considerably less than that which was enjoyed by the Interstate Commerce Commission at the time of the opinion in question. Beginning at page 404 the Justice wrote:

> "In construing this provision it is important to bear in mind the limits of the Commission's control over rates. Neither the Act to Regulate Commerce nor any amendment thereof has taken from the carriers the power which they originally possessed, to initiate rates: that is, the power, in the first instance, to fix rates or to increase or reduce them. Legislation of Congress confers now upon the Commission ample powers to prevent by direct action the exaction of excessively high rates. The original act, proceeding upon the common-law rule which prohibits carriers from charging more than reasonable rates, gave the Commission power to declare illegal one unduly high; but even after such a determination the Commission lacked the power to fix the rate which should be charged . . .

"Congress, however, steadfastly withheld from the Commission power to prevent by direct action the charging of unreasonably low rates. The common law did not recognize that the rate of a common carrier might be so low as to constitute a wrong; and Congress has declined to declare such a rule. Despite the original Act to Regulate Commerce and all amendments, railroads still have power to fix rates as low as they choose and to reduce rates when they choose. The Commission's power over them in this respect extends no further than to discourage the making of unduly low rates by applying deterrents. One such deterrent is found in the fact that low rates, because voluntarily established by the carrier, may be accepted by the Commission as evidence that other rates, actual or proposed, for comparable service are unreasonably high. . . . The voluntary making of unremuneratively low rates in important traffic may also tend to induce the Commission to resist appeals of carriers for general rate increases on the ground of financial necessities. But the main source of the Commission's influence to prevent excessively low rates lies in its power to prevent unjust discrimination . . . . The order prohibiting the unjust discrimination, however, leaves the carrier free to continue the lower rate; the compulsion being that if the low rate is retained, the rate applicable to the locality or article discriminated against must be reduced. That is, the carrier may remove discrimination either by raising the lower rate to the relative level of the higher, or by lowering the higher to the relative level of the

lower, or by equalizing conditions through fixing rates at some intermediate point."

The foregoing decision arose out of *Commodity Rates to Pacific Coast Terminals*, 32 I. C. C. 611. In its opinion, at page 622, the Commission said:

> "We are of the opinion that these carriers should be permitted to compete for this long distance traffic so long as it may be secured at rates which clearly cover the out-of-pocket cost . . . . Since the average ton-mile revenue of these carriers is approximately 9 mills on freight traffic, it is probable that a rate which produces 45 per cent as much as *the average pays more than the out-of-pocket cost and therefore does not impose a burden upon other traffic. None of the rates proposed appear, therefore, to be open to the charge that they pay less than out-of-pocket cost* . . . " (Italics supplied.)

The principle there applied by the Commission has been followed by it consistently. For example, see *Louisville & N. R. Coal & Coke Rates*, 26 I. C. C. 20, 27:

> "Anything above the out-of-pocket cost of handling is a contribution to general expenses, and to that extent tends to relieve rather than burden other traffic . . . "

The reason underlying the rule is set forth in *Boileau v. Pittsburgh & L. E. R. Co.*, 24 I. C. C. 129, 132, where it is said:

> " . . . It is a well established and generally recognized rule that if additional business can

be taken on at rates which will contribute at least a little in additional to the actual out-of-pocket expense, the carrier will be advantaged to that extent and all its patrons benefitted to the extent to which such traffic contributes to the net revenue. It is obvious that without the amount of net contributed by this class of traffic, assuming a certain amount of revenue to be necessary, such revenue must be contributed entirely by the remaining traffic and the exclusion of this competitive traffic would increase the burden upon the other traffic to a corresponding extent."

See also *Fourth Section Violations in the Southeast* 30 I. C. C. 153, 177:

"It may fairly be concluded from the testimony that there is none of these rates for long-distance traffic which pays less than the additional cost of handling and their acceptance by the railways results in some net revenue and does not result in an increased burden upon traffic to and from intermediate points."

See also *Northern P. Ry. Co. v. Helvering*, (CCA 8, 1936) 83 Fed. 2d 508, 514.

In this connection it is well to remember the principle enunciated in *Lake Cargo Coal Cases*, 181 I. C. C. 39, 51, quoting from *Galveston Com'l. Assn. v. Galveston, H. & S. A. Ry. Co.*, 128 I. C. C. 349, 371:

"The fact that the law declares unlawful only discrimination that is unjust and only prejudice that is undue indicates that it was the intent to give the carriers some latitude in fixing rates,

and that distance or cost of service need not be the sole criterion by which rates shall be measured."

Furthermore, we should not confuse those cases in which it is contended by a carrier that a rate fixed by a utility commission is confiscatory and those cases in which the rate is initiated by the carrier. In the latter instance the rate may be much lower and still be reasonable within the test to be applied under the circumstances. To illustrate the point, a rather lengthy quotation from the opinion of the Interstate Commerce Commission in *Transcontinental Cases of 1922*, 74 I. C. C. 48, at pages 68-71, is helpful:

"For the intermountain interests it is argued that a rate to be reasonably compensatory to the more distant terminal point must bear its full share of operating expenses, interest on funded debt, equipment and joint facility rents, taxes, and the percentage return fixed by us pursuant to section 15a of the interstate commerce act. In support of this interpretation various court decisions are cited defining the words 'reasonably compensatory,' or words that are said to be tantamount thereto.

"We are unable to accept this interpretation of the phrase 'reasonably compensatory.' So interpreted, the long-and-short-haul rule of the fourth section must become absolute or rigid from the very nature of the case. According to this version of 'reasonably compensatory,' the rate to the farther distant point must yield its full share

of the expense of utilizing the additional track mileage covered, as well as its full share of the additional expenses incident to the longer use of equipment required for the longer haul. There may be difficulty in discovering to a nicety the exact legislative intent in the amended fourth section. But the rejection of an absolute long-and-short-haul clause by both Houses of Congress is inconsistent with any construction of the phrase in question which would be equivalent in effect to an absolute clause.

"A similar but less extreme interpretation of the word 'reasonably compensatory' is urged on behalf of various State commissions in the intermountain territory. It is pointed out that there is a margin between the rate which barely escapes being confiscatory and the highest rate which a regulating body may lawfully allow. To the intermediate point a rate might approach the latter limit while a rate to a more distant point might conceivably be less and yet not so low as to be confiscatory. Seemingly, the rate to the more distant point may contribute something less than a full proportionate share of return upon investment and thus theoretically be less than a greater rate to an intermediate point. This version of 'reasonably compensatory' seems to agree with the former interpretation in that both require that the rate to the more distant point must pay its full share of all operating expenses, but is more elastic in not requiring that it must contribute its full share to the return designated as profit. Both interpretations appear to hold in common

that a 'reasonably compensatory' rate cannot be less than a rate which, if imposed by a regulatory tribunal, would be adjudged nonconfiscatory.

"We are unable to accept this interpretation of the words 'reasonably compensatory' as used in the amended fourth section.

"Where a rate imposed by a regulatory body is under judicial review upon the allegation that the rate fixed is confiscatory, it has been held by the courts that a rate may not lawfully be fixed by such tribunal which is based alone on the out-of-pocket costs ascribable to that particular traffic, but that to be lawful the rate must be sufficient to cover a ratable proportion of the average cost of freight traffic generally, including a return on the property devoted to public service. To hold otherwise would compel the performance of a certain specified kind of service by the carrier at less than average cost. The extension of this principle to other classes of traffic, if pursued far enough, would bankrupt the road.

"Where, however, carriers voluntarily propose to reduce certain rates to an out-of-pocket *plus* basis in order to augment the total traffic carried, a wholly different situation is presented. The menace of confiscation is absent, for *volenti non fit injuria*; and the additional traffic, if secured with a resulting augmentation of net revenue instead of laying a burden upon other traffic, affords the possibility of lightening the burden thereon by bringing a greater tonnage under contribution to net revenue.

"The criteria of a reasonably compensatory

rate in a confiscation case are therefore essentially distinct from the criteria of a reasonably compensatory rate where carriers volunteer a reduction on certain rates to an out-of-pocket *plus* basis. In the first set of cases the carrier has presumably been charged with seeking to extract from the public which is served more than the services are reasonably worth; in the second set of cases the carrier is accused by protestants, not primarily of seeking to extort more than the service is reasonably worth to those who receive the service, but of working undue discrimination as between those who can and those who can not avail themselves of the lower rates voluntarily proposed.

"The criterion of a reasonably compensatory rate suggested by the carriers has been indicated above. It is summarized in the formula 'out-of-pocket-expenses-plus-some-profit'."

As this Court suggested in *Minneapolis & St. Louis R. R. Co* v. *Minnesota*, 186 U. S. 257, 22 S. Ct. 900, 46 L. Ed. 1151, at page 268 of the official report:

"... It sometimes happens that, for purposes of ultimate profit and of building up a future trade, railways carry both freight and passengers at a positive loss ..."

Putting it in another light, it was said by Mr. Justice Stone dissenting, in *Texas & Pacific Ry. Co.* v. *U. S.* 289 U. S. 627, 53 S. Ct. 768, 77 L. Ed. 1410, at page 668:

"... It is true that in cases arising before the enactment of the Transportation Act, 1920, by

which power was given to the Commission to fix a minimum rate, it could not remove a discrimination by prescribing a minimum rate to one of the competing localities . . . "

This was agreed to by the majority opinion at page 626, where it said:

"Since 1887, §1 has forbidden that an export or import rate be unreasonably high; and since the Transportation Act, 1920, the Commission has been charged to see that the rate be not so low as to render the receipts of the business unremunerative."

Of particular relevance to the present case, in the light of the record and the foregoing authorities, is the opinion of Mr. Justice Cardozo in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 55 S. Ct. 462, 79 L. Ed. 1023, at pages 505-6 of the official report:

"The second report of the Commission is a long and discursive narrative. To paragraphs at the end give the key to its meaning:

" 'We find that the proposed rates, if permitted to become effective, would lead to a disruption of the rate structure on coal in the Indiana and related areas, thus impairing the revenue of the carriers serving those areas and their ability to provide the adequate and efficient transportation service contemplated by §15a of the act; that they would cause a disruption of the individual groups from which the rates are proposed; and that they would cause a disruption of the long-standing

rate relation existing for competitive purposes, between the several Indiana groups.

"'We find that the proposed rates would be unreasonable and in violation of §§ 1(5) . . . and 15a (2) of the act . . .'

"The statement in the second of these paragraphs that the proposed rates would be 'unreasonable' must be read in the light of the report as a whole, and then appears as a conclusion insufficient as a finding unless supported by facts more particularly stated . . . There is no suggestion in the report that the rates have been reduced as to be less than compensatory. True they do not reach the maxima beyond which charges are too low. A zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself . . . We lay to one side cases of discrimination or preference or rivalry so keen as to be a menace to the steady and efficient service called for by the statute . . . Those tendencies excluded, 'a carrier is entitled to initiate rates and, in this connection, to adopt such policy of rate making as to it seems best . . . .'"

Previously, the learned Justice had said at page 504:

"This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power. Florida v. United States, 282 U. S. 194, 215, 75 L. Ed. 291, 304, 51 S. Ct. 119; United States v. Baltimore & O. R. Co., January 7, 1935, 293 U. S. 454, ante."

That statement leads us to a consideration of the authorities indicating the extent of the judicial review the Appellant is entitled to in the present proceeding.

Counsel is not sure whether the decision in *Crowell* v. *Benson*, 285 U. S. 22, 52 S. Ct. 285, 76 L. Ed. 598, is still the law in all its aspects. At any rate we are not asking for a trial *de novo* on any point. We are willing to submit the question on the record made before the Commission and to that extent at least it is believed that *Crowell* v. *Benson* does represent the existing law, particularly where it was said, at page 254 of the particular report:

> ". . . A different question is presented where determinations of fact are fundamental or 'jurisdictional', in the sense that their existence is a condition precedent to the operation of the statutory scheme . . . "

In that case the Court cited *I. C. C.* v. *Humboldt SS. Co.*, 224 U. S. 474, 32 S. Ct. 556, 56 L. Ed. 849, where it was said at page 484:

> ". . . It is true there may be a jurisdiction to determine possession of jurisdiction. *Ex parte Harding*, 219 U. S. 363. But the full doctrine of that case cannot be extended to administrative officers. The Interstate Commerce Commission is purely an administrative body."

The same doctrine was enunciated by Mr. Justice Brandeis in *Ng Fung Ho* v. *White*, 259 U. S. 276, 42 S. Ct. 492, 66 L. Ed. 938, at pages 942-3:

> "Jurisdiction in the executive to order deporta-

tion exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact."

While the phrase "jurisdictional fact" is not used, the same fundamental thought was applied by this Court in *Kessler* v. *Strecker*, 307 U. S. 22, 59 S. Ct. 694, 83 L. Ed. 1082, at page 1090:

> ". . . The proceeding for deportation is administrative. If the hearing was fair, if there was evidence to support the finding of the Secretary, and if no error of law was committed, the ruling of the Department must stand and cannot be corrected in judicial proceedings. If, on the other hand, one of the elements is lacking, the proceeding is void and must be set aside . . . "

Similar is *Federal Radio Commission* v. *Nelson Brothers Co.*, 289 U. S. 266, 53 S. Ct. 627, 77 L. Ed. 1166, where Chief Justice Hughes said at page 277:

> "A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without sanction of the authority conferred. And an inquiry into the facts before the Commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon, or involve the question of, administrative authority . . . "

Applied to a body of the nature of the Maritime Commission, it was said in *I. C. C.* v. *U. P. R. R. Co.*, 222 U. S. 541, 32 S. Ct. 108, 56 L. Ed. 308, at page 547:

that the findings of the Interstate Commerce Commission are final unless "beyond its statutory power; or . . . based on a mistake of law".

To these principles should be applied the facts as disclosed by the record produced before the Maritime Commission and upon which the order under attack was based.

We need go no farther than to the report of the Commission. It shows conclusively that the present wharf storage rates do pay this Appellant more than its out-of-pocket costs sustain in that connection.

In the first place, the Commission orders the assessment of a wharf storage rate in the nature of a penalty for the first five days after the expiration of free time. In its final report, in discussing the Edwards-Differding formula advanced in Docket 4090 before the California Railroad Commission, and which was adopted by the Maritime Commission in this case:

> "A *penalty* demurrage charge of 5c per day is exacted for the first five days beyond the expiration of free time. *This charge is intended to compel the removal of cargo off the dock or into storage.*" (R., p. 35.) (Italics supplied.)

And, in its conclusion in this respect, Appellee Commission held:

> "Upon consideration of all the evidence, we are of the opinion that the 4090 scale, *including the 5-cent penalty rate*, should be adopted . . . ." (Italics supplied.) (R., pp. 37-8.)

Obviously, a charge which is a penalty is much higher than a charge which is merely compensatory.

The quoted portion of the report discloses the true intention of the Commission in this case. Whether or not the goods remain on the dock is no concern of the Commission: Certainly it has no bearing upon the matter of discrimination; and it makes very apparent that the Commission was not at all concerned with discrimination but was merely trying to hang its hat on it in order to accomplish its real purpose, namely, to raise the rates of wharf storage at the San Francisco Bay terminals to a level which it believed to be compensatory.

Is that not enough to show that the Commission's finding of "discrimination" and "burden on other traffic" is merely shadow and not substance?

The Commission has affixed to its final report an appendix entitled "Comparative Statement Showing for Eastbay Terminals Daily Wharf Demurrage Rates and Revenue for Thirty Days Under Existing Tariffs; Rates Proposed by California Railroad Commission in Case 4090 and Revenue Thereunder for Thirty Days; And Minimum Cost of Storage With Normal Piling for Thirty Days on Those Commodities for Which Floor Space Requirements Are Available. Rates, Revenue and Cost in Cents Per Ton of 2000 Pounds" (R., pp. 42-43.)

It shows, for instance, that under the existing rates the terminals' revenue on merchandise N.O.S. stored for thirty days would be 60c. It computes the cost of the

necessary floor space at 49.06c and all other costs at 45.23c, including administrative overhead, and other items that are not out-of-pocket expenses.

The floor space cost, of course, reflects the cost of construction, taxes, if any, interest on investment, repairs and depreciation, and like factors. Those are not out-of-pocket costs for the reason they remain constant whether or not the space is used. Therefore, the item of 49.06c should be eliminated, leaving a revenue of 60c for thirty days, against an out-of-pocket cost which is something less than 45.23c. By no stretch of the imagination can such a rate be said to cast a burden upon other traffic. And it should be noted that the 45.23c cost figure includes other items, such as general administrative overhead and other like items of constant recurrence, that are never chargeable as out-of-pocket expense.

Let us take the case of canned goods, which is one of the largest moving commodities using wharf storage at San Francisco Bay Terminals. The revenue is shown at 37½c for thirty days. The cost, excluding the floor space cost is 45.23c for a like period. However, for that commodity the report and order require the assessment of a handling charge of 25c. It must be presumed that this charge represents approximately the cost of the handling.

It is shown abundantly in the record that because of the broad transit sheds on the municipal facilities at

Oakland, such handling is very rarely indulged in. This is recognized in the report where it is said:

> "Oakland and Parr Richmond with a large amount of unused transit space available, criticize the inclusion of the cost of high piling and extra handling because at their terminals little additional handling of cargo is necessary. This argument overlooks the fact that the handling charge is directly related to the most efficient use of floor space. If it was cheaper to leave goods as the stevedores and shipper dropped them, this cost was used. But where the savings in floor space cost more than compensated for the expense of high piling over the period the goods remained in storage, costs based on high piling were used as they resulted in a lower cost to the shipper. Also the argument ignores the necessity for an adequate return on the costs of floor space because if the cargo is not handled by high piling or otherwise it follows that additional costs are automatically incurred." (R., p. 37.)

It is clear that the Commission has considered floor space and cost of handling as counteracting factors in its "all other costs" column. Therefore, if we are correct in our premise that floor space shall not be counted in the cost because it is not an out-of-pocket cost, and there is no handling, it follows that the sum of 25c should be deducted from the sum of 45.23c, leaving a revenue to the terminal of 37½c per thirty days, against an out-of-pocket expense of 20.23c, or something in that neighborhood.

There is nothing in the record to dispute these facts. That, of course, is a negative statement, but the Court should accept it unless the Government is able to point to the pages of the record disproving it. This challenge was not met before the Commission or in the Court below.

Bearing in mind that the Maritime Commission is one of limited jurisdiction, and that such jurisdiction must be predicated on facts in the record; that it here asserts jurisdiction to prescribe a rate for the purported purpose of removing a discrimination; that a rate that meets out-of-pocket costs plus a little over casts no burden on other traffic, and hence, cannot be discriminatory; that the Commission's own report shows (1) that the rates presently in effect produce more than out-of-pocket expense to this Appellant and (2) that the rate prescribed by the Commission includes a penalty, which is obviously higher than a fully compensatory rate, and more patently, much higher than one producing out-of-pocket costs—considering all these factors, it is submitted that the order of the Commission is arbitrary and capricious and beyond the jurisdiction with which Congress endowed it.

Point D. The Evidence Does Not Support the Commission's Order With Respect to Free Time Allowances.

Frankly, this matter of free time, in itself, is of no great importance to this Appellant. We have no real objection to observing the free time periods which the Commission thinks are reasonable. Throughout the hearings and in our briefs and in the argument before the Commission we took no particular notice of it because, as stated, we were rather indifferent on the point.

What we are concerned with primarily is the matter of wharf storage rates, and we attack the Commission's finding as to free time because the Government is now urging that its order in respect to wharf storage be supported because of its effect upon the free time.

In the Court below the Government said in its brief:

> "The Commission is not making any attempt to extend its power to cover rates. The granting of excessive *free* time in itself raises no question of rates—but the discriminatory and unreasonable practices of the respondents in respect of free time cannot be effectively prevented *if by means of nominal or non-compensatory rates the terminals can continue the discrimination and unreasonableness even though to a lesser degree.* Discrimination does not cease to be such merely because it is reduced in degree.
>
> "In order to enforce the observance of reasonable and non-discriminatory regulations and practices, the Commission has also specified that the respondents shall charge compensatory rates, or

rather rates more nearly compensatory than those heretofore in effect. The rates approved by the Commission are expressly found to be not in excess of cost, and the charging of such rates is necessary in order to prevent evasion of the Commission's order *for, if the respondents may fix rates after expiration of free time without any control, they can carry on with impunity the discriminatory and unreasonable practices in respect of free time.* Certainly the Commission has the incidental power to prevent evasion of its order; and its order may be justified on this ground alone." (Italics supplied.)

In view of this contention, the order of the Commission in connection with free time allowance becomes a matter of importance and it is not supported by any evidence. Therefore, it is void.

In discussing free time, the Commission says in its report:

". . . Generally ten days are permitted except that San Francisco allows five days in coastwise and intercoastal (in-bound) trade and seven days in the foreign and offshore trades (in-bound). But under the stress of competition, most of the larger terminals, in cases of emergencies, extend the free time either to cover the additional number of days of delay to the vessel or in the case of Oakland, to such number of days as 'is warranted and equitable in each individual case', according to the judgment of the Port Manager. This practice appears to be based on the theory that if the shipper

is not at fault the terminal operator should waive the demurrage. Obviously, when demurrage is waived, transit shed space, the most valuable in the terminal, is being wasted. This involves a cost which has to be recouped somewhere and it is unreasonable that those shippers who do not use the piers beyond the free time should be forced to bear the burden, either directly or indirectly. This practice also affords an opportunity to discriminate between shippers." (R., pp. 23-4.)

This is an example of burning the barn down to get the rat. It is apparent that the Commission has two objections on this matter of free time; first, that the extension of free time casts a burden on other shippers and, secondly, that the element of discretion affords an opportunity for discrimination. Even if we concede the validity of those objections, it does not warrant the overturning of the entire free time structure. If extensions of the free time period, either on a fixed or discretionary basis, is discriminatory, that affords no foundation for an order of the Commission shortening the regular free time allowance set up in the tariffs of these petitioners. In other words, if the order of the Commission had stopped with a prohibition of extension of free time beyond that set up in the tariff, there would be some evidence in the record and some support in the Commission's findings for its order. There is no such evidence nor support for the further step of the Commission in cutting down the fixed free time period.

Finding No. 6 of the Commission reads in its pertinent part as follows:

> "That there is a lack of uniformity in, and application of, free time rules, regulations and practices of respondents; and that the manner in which they are applied affords opportunity for unequal treatment of shippers. Said rules, regulations and practices are unduly prejudicial and preferential in violation of Section 16 and unreasonable in violation of Section 17 of the Shipping Act, 1916, as amended. We prescribe, and shall order enforced a regulation providing that free time allowances should be no greater than the period set forth in Table 1 of this report . . . "

That table reads as follows:

	In-bound Days	Out-bound Days
Coastwise and Inland Waterway	5	5
Intercoastal	5	7
Foreign	7	7
Transshipment	10	10

Mind, we are not speaking now of any extension of free time, but of the regular fixed period which is set up in the tariffs of these petitioners.

It is submitted that there is no evidence to support the action of the Commission in cutting the regular fixed period. The following is all that the Commission has to say about it in its report:

"In *Storage of Import Property*, 1 U. S. M. C. 676, 682 (1937), we said:

> The furnishing of valuable free storage facilities to certain shippers and consignees beyond a reasonable period results in substantial inequality of service as between different shippers of import traffic, and is beyond the recognized functions of a common carrier.

"And, in *Storage Charges under Agreements 6205 and 6215*, 2 U. S. M. C. 48, 52 (1939), we stated:

> All receivers of cargo must use the piers, and any preferred treatment, by charges or otherwise, of certain classes of cargo results in discrimination against other cargo.

"Members of Northwest Marine Terminal Association grant no extensions of free time. They, as well as terminals at Los Angeles, provide 10 days' free time in inetrcoastal (outbound) and foreign off-shore trades. In other trades these terminals like San Francisco, grant 5 days except that at Seattle and Tacoma the time is 10 days on coastwise out-bound. The California Commission, in *Case No. 4090, supra*, after a study of the various factors involved in the assembling and distribution of cargo at San Francisco Bay port, location of points of origin, vessels' organizations, customs clearance, efficient loading and other matters, recommended free time periods, exclusive of Sundays and holidays, as follows:"

Then follows Table 1, above set forth.

"Counsel for the Commission recommended the

prescription of these periods and exceptions thereto as reasonable regulations under Section 17 of the Shipping Act, 1916. Nearly all of the witnesses who testified on this subject favored stricter free time regulations than those now in effect. With few exceptions, respondents, in their reply briefs, showed little opposition to the periods recommended, most of their comments being directed to the exceptions proposed . . .

"Upon consideration of the evidence outlined above, the free time period set forth in Table 1 is found to be reasonable and proper. Respondents' rules, regulations and practices with respect to free time, in so far as they permit free time allowances greater than outlined in said table, exclusive of Sundays and holidays are unduly prejudicial and preferential in violation of section 16 of the Shipping Act, 1916, as amended, and unreasonable in violation of section 17 of that act . . ."

I have quoted all the pertinent evidence referred to by the report. If you eliminate the matter of the extension of the fixed period of free time allowance, there is not an iota of evidence to support the Commission's finding that the existing fixed periods are unreasonable, preferential or prejudicial. They apply to all shippers alike. Moreover it is definitely shown by the Commission's own report, that members of the Northwest Marine Terminal Association, that is, the ports on Puget Sound and the Columbia River, and Los Angeles allow ten days' free time in intercoastal out-bound, and foreign and offshore trades, and that Seattle and Tacoma allow ten days on

coastwise out-bound. In the case of Appellant, under Table 1, it would be permitted to grant an allowance of only five days in coastwise out-bound and seven days in intercoastal, foreign and offshore out-bound. As the report recognizes, the existing period is generally ten days, as in the case of this Appellant.

There is no fact adduced by the Commission in support of its *ipse dixit* that the existing free time provisions of Appellant's tariff are unreasonable. There is nothing in the record tending to prove them so.

It is respectfully submitted that the Commission should not be allowed to assume to itself the power to regulate rates through subterfuge.

Point E. The Commission Has No Power Over Wharf Storage.

This point has been urged repeatedly before the Commission and the Court below and has gone heedless. Wharf storage, by express definition in the Shipping Act, 1916, is excluded from the purview of the Commission.

As we read the decision of this Court in *Swift & Co. v. United States*, 316 U. S. 216; 62 S. Ct. R. 948, 956; 86 L. Ed. 1391, we believe it has been decided as we urged it.

We have heretofore indicated that in certain functions the wharf operator acts as the agent of the carrier and in certain others as agent of the shipper or consignee. The distinction is recognized in *Armour & Co. v. Alton R. Co.*, 111 Fed. 2d 913, 915.

The question involved was whether the consignee of cattle could recover from the rail carrier the so-called yardage fee imposed by Union Stock Yards Company at Chicago on each head of stock passing through the yard, the theory being that this was an unloading charge which had already been paid for in the line haul rate. The Court said:

> "'At the yards employees of the Yards Company unload the livestock into unloading pens located upon the company's property. For this service the company charges the carriers a certain rate which is filed with the Interstate Commerce Commission. Since this service is a rail transpor-

tation service, rendered by the carriers (through their agent, the Yards Company) for the shipper, the charge therefor is covered by the line-haul rate. Adams v. Mills, 286 U. S. 397, 52 S. Ct. 589, 76 L. Ed. 1184. On the other hand, in addition to and separate from the rendition of rail transportation services, the Yards Company also performs specified stockyard services such as holding, feeding and storing. In rendering such a special service the company is subject to the Packers and Stockyards Act, and for such services charges the packer a certain rate which is filed with the Secretary of Agriculture. 42 Stat. 159, 7 U. S. C. Secs. 181 et seq., 201 (b), 226 7 U. S. C. A. §§181 et seq., 201 (b), 226.

"It might be said that in the rendition of a transportation service the Yards Company acts as agent of the carriers, but that in the performance of a stockyard service it acts as agent of the packer. Adams v. Mills; supra; Union Stock Yard & Transit Co. v. United States, supra; Burton v. Wabash Ry. Co., 332 Mo. 268; 58 S. W. 2d 443, 447. It has also been said that 'Stockyard services' do not commence until unloading ends; they end when loading begins.' Denver Stock Yards v. United States, 304 U. S. 470, 477, 58 S. Ct. 990, 82 L. Ed. 1469. See also Burton case, supra."

Storage, other than that involved in the so-called free time period, is not part of transportation. This is recognized in *Ex parte* 104, *Propriety of Operating Practices, New York Warehousing*, in the decision in 198

I. C. C. 134, affirmed on the rehearing in 216 I. C. C. at 292. The Commission said, at page 195:

> "While the storage of property is clearly within the transportation service which carriers are obligated to furnish, their duty under these provisions extends only to that storage which is necessarily incidental to the transporting of such property. To be incidental business *the storage must be preliminary either to immediate transportation or immediate removal.*" (Italics supplied.)

Of this, the Supreme Court said, affirming the Commission's order in *Baltimore & O. R. Co.* v. *United States*, *supra*, at page 516:

> "Neither the complaints of the competitors of the carriers in the warehousing business nor the terms of the commission's order are directed at the involuntary storage of goods incidental to transportation. This is the period before or after shipment during which the goods occupy cars or floors without any charge above the strictly transportation rate."

The point we make is that wharf storage is furnished independently of the water carrier. It is arranged for directly by the shipper or consignee and the carriers are not consulted. The charge for the service is not included in the carrier's compensation and the carrier undergoes no liability on its account.

The Commission's witness, Mr. Differding, makes this

clear, where the following question was asked and answer given.

> "MR. GRAHAM: Q. Whereas, on some of the other terminals around the bay which have more space available, revenue plays an important part in this problem?
>
> "A. Yes. Witness the two San Francisco piers No. 45 and 56 and the Eastbay terminals. They were built definitely for the handling of cargo for periods of time, and properly so; whereas the finger piers are the old type and they are under assignment by a *steamship operator who has no interest whatsoever in wharf demurrage cargo* and he can't be blamed for that." (Italics supplied.) (R., p. 726.)

Let us then refer again to the definition of "other person" contained in the first section of the Shipping Act, 1916. It reads:

> "The term 'other person subject to this act' means any person not included in the term 'common carrier by water' carrying on the business of forwarding or furnishing wharfage, dock, warehouse or other terminal facilities *in connection with a common carrier by water.*" (Italics supplied.)

The italicized phrase precludes any possibility of the Maritime Commission successfully asserting jurisdiction over wharf storage rates. Certainly by no stretch of the imagination can wharf storage be held to be furnished "in connection with a common carrier by water", since it is no part of transportation and since the common

carrier by water has no interest in it. It is furnished altogether independently. Any contrary holding would give the Maritime Commission the right to regulate the rates of any uptown warehouse which happened to store cargo that had moved in or was to move out by water, because there can be no distinction between the service rendered by such a warehouse and the wharf storage service.

It is respectfully submited that the Maritime Commission, whatever its other regulatory powers may be, has no jurisdiction over wharf storage or the rates charged therefor.

Point F. The Commission Has No Power to Compel Municipal Leases and Agreements to Be Filed With It for Approval.

In its final report and order the Commission has held that a lease from Appellant City of Oakland to Howard Terminal, one of the respondents in Docket 555, and a similar lease from the City to McCormick Steamship Company, are required to be filed with and approved by the Appellee Commission. This is placed upon the ground that the City and the two lessees are "other persons" subject to the act and, because the leases require the lessees to conform their rates as nearly as practicable to those levied by the City, the leases are within the scope of Section 15 of the Shipping Act, 1916.

Special treatment of the subject under a separate heading is desirable for purposes of emphasis. We wish the Court to understand that the issue involved in this case is much broader than the mere regulation of rates.

A decision that the activities of the Board of Port Commissioners of the City of Oakland are subject to the scrutiny and review of the Appellee Commission should not be arrived at lightly, because of the disruption it would cause in governmental activities of this department of the City.

The Board has two types of functions. One consists in the direct operation of the wharves under its supervision. The second consists in the exercise of all the police power the City possesses in connection with its waterfront. In the latter capacity it adopts and enforces gen-

eral regulations for the public and welfare in that connection. It grants franchises for the operation of wharves, private and public utility wharves. (See *City of Oakland* v. *Hogan*, 41 Cal. App. 2d 333, and *City of Oakland* v. *El Dorado Terminal Company*, 41 Cal. App. 2d 320.)

It makes leases of tide and other lands and certain facilities on behalf of the City. Except in exceptional circumstances, these leases must be awarded at public bidding. (City Charter, Sec. 214. [Statutes of California, 1927, p. 1978] Sec. 51, subd. 41; [Statutes of California, 1911, p. 1551].)

While, generally, there has not been any competition in the bidding for leases, there have been occasions where it did occur. Once a lease has been let at public auction, it is obvious its terms cannot be changed. That, consequently, requires that the draft of the lease be submitted to the Maritime Commission before it is offered for public bidding, if the Commission's order is correct. At that time we would not be in a position to tell the Commission who the lessee would be. Consequently, the Commission could not decide, in many instances, whether or not approval of the lease would be in accordance with its policy.

On the other hand, if the Commission does have the power its claims, it is possible that the City charter is superseded by federal law, and that the requirements of public bidding as to leases within the reach of that power may be dispensed with, notwithstanding the desires of the electors of the City.

This question of how far the City charter and state law would be superseded will create the utmost confusion, and the local officers charged with the operation of the port will face the prospect of having to chart a difficult and, at times, impossible course between the Scylla of malfeasance in office for failing to obey local law and the Charybdis of the penalties prescribed in the Shipping Act, 1916.

CONCLUSION.

For each of the foregoing reasons, it is urged that the decision of the Court below should be reversed, with directions to set aside and permanently enjoin the order of the Commission complained of.

Dated at Oakland, California, November 3, 1943.

Respectfully submitted,

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